

ANTITRUST MODERNIZATION COMMISSION

PUBLIC HEARING

Thursday, October 26, 2005

FTC Headquarters, Room 432
600 Pennsylvania Avenue, N.W.
Washington, D.C.

The meeting convened, pursuant to notice at 1:30 p.m.

PRESENT:

DEBORAH A. GARZA, Chairperson
JONATHAN R. YAROWSKY, Vice Chair
BOBBY R. BURCHFIELD, Commissioner
W. STEPHEN CANNON, Commissioner
DENNIS W. CARLTON, Commissioner
JONATHAN M. JACOBSON, Commissioner
DONALD G. KEMPF, JR., Commissioner
SANFORD M. LITVACK, Commissioner
JOHN H. SHENEFIELD, Commissioner
JOHN L. WARDEN, Commissioner

ALSO PRESENT:

ANDREW J. HEIMERT, Executive Director
and General Counsel

WILLIAM F. ADKINSON, JR., Counsel

TODD ANDERSON, Counsel

HIRAM ANDREWS, Law Clerk

KRISTEN M. GORZELANY, Paralegal

These proceedings were professionally transcribed by a court reporter. The transcript has been edited by AMC staff for punctuation, spelling, and clarity, and each witness has been given an opportunity to clarify or correct his/her testimony.

C O N T E N T S

**Hearing: Allocation of Antitrust Enforcement between the
States and the Federal Government**

Panelists:

Prof. Michael E. DeBow
Prof. Harry First
Phillip A. Proger
Hon. G. Steven Rowe

P R O C E E D I N G S

CHAIRPERSON GARZA: I would like to open the hearings of the Antitrust Modernization Commission, October 26, 2005.

I would like to welcome our distinguished witnesses and our guests.

One of the topics selected for study by this Commission is the multiplicity of antitrust policy and enforcement agents in the United States. The U.S. is somewhat unique in the degree of its decentralization. Besides the two federal antitrust agencies, one in the executive branch and the other an independent administrative agency, there are 50 state attorneys general, countless private parties, and several federal and state sector agencies regulating key infrastructure industries like transportation, energy, telecom, and banking.

The question of whether this is an optimal system and what, if any, changes can or should be made needs to be looked at as a whole, and it also needs to be considered in light of other issues the Commission is examining, such as the question of

1 whether federal remedial power should be augmented,
2 the indirect purchaser issue, and even the
3 globalization of antitrust enforcement.

4 Today's hearing, however, will focus
5 specifically on the interaction of state and federal
6 antitrust enforcement. Other hearings have addressed
7 or will address dual federal enforcement, sector
8 regulation, federal remedies, indirect purchaser
9 litigation, and international antitrust issues.

10 I would like to start by asking each of the
11 witnesses to summarize his written testimony in no
12 more than about five minutes. The box here on the
13 table and on your table will have lights to help you
14 monitor your time. Green means--green will come on
15 initially and as you come to the end of your time, it
16 will turn yellow and then red.

17 I am not likely to stop you cold in the
18 middle of your statement, but if you could try to
19 monitor your own time, that would be great.

20 After you have summarized your written
21 testimony, then Commissioner Warden will take the
22 lead for the Commission in asking questions initially
23 for about 20 minutes or so.

1 Following that, other Commissioners will
2 each have about 10 minutes to ask any questions they
3 may have. Normally, we do this in five minutes, but
4 because we have a relatively small panel and one of
5 our Commissioners absent, we will give each
6 Commissioner 10 minutes today, if they want it.

7 The hearing is being transcribed.
8 Transcripts will be available to the public as are
9 all the witness statements on the AMC website,
10 www.amc.gov.

11 And with that, I will give it over to the
12 panel, and General Rowe, would you like to go first?

13 ATTORNEY GENERAL ROWE: Yes, ma'am. Thank
14 you very much, Madam Chair, members of the
15 Commission, and fellow panelists. It is a privilege
16 to be here this afternoon, and I thank you for
17 allowing me to come and testify today.

18 My name is Steven Rowe. I am the attorney
19 general for the state of Maine. With me today is
20 Assistant Attorney General Francis Ackerman. Francis
21 is a long-time antitrust lawyer in the Office of the
22 Attorney General in Maine.

23 I have served as attorney general for the

1 state of Maine for the past five years, and along
2 with the obligations that go with the job of state
3 attorney general is the duty to enforce state
4 antitrust laws.

5 As you know, state attorneys general have
6 enforcement powers and obligations under federal law
7 as well.

8 I am here today because I am deeply
9 concerned by proposals to limit or even eliminate
10 state enforcement antitrust authority and preempt
11 state laws. I know that many other state attorneys
12 general share my concerns.

13 However, before going any further, let me
14 make clear that my comments today represent my views
15 and the views of my office only, and are not those of
16 any other agency or person.

17 I have read my fellow panelists' submissions
18 and look forward to a lively discussion this
19 afternoon, but before speaking about our differences,
20 I want to emphasize that each of us here before the
21 Commission, like you, as enforcers, as scholars, as
22 practitioners, we all share a common commitment, and
23 there are two fundamental premises that I am

1 confident we can all accept as a basis for our
2 dialogue today.

3 First, antitrust law serves public policy in
4 ways that are crucial to our free enterprise economic
5 system and its governance. They are designed to
6 protect competition in the marketplace and secure its
7 benefits for all citizens.

8 The second premise really follows from the
9 first. It is that antitrust law should be enforced
10 against all violations, large or small, global or
11 local.

12 In other words, antitrust enforcement should
13 not be selective. On this basis, I hope we can agree
14 that any reform proposal that would appreciably
15 diminish enforcement coverage at any level should be
16 rejected.

17 To that end, I would like to try to dispel
18 some fundamental misunderstandings.

19 Critics of state enforcement argue that
20 reforms are needed because of the overlap in state
21 and federal jurisdiction. They say it results in
22 duplication and inefficiency and greater burdens and
23 longer delays and philosophical divergence and

1 uncertainty.

2 At the same time, it has been suggested that
3 state enforcement is expendable because it has
4 accomplished so little. The notion that the states
5 have done little to enforce antitrust laws is a grave
6 misconception, but one which unfortunately the states
7 have helped to create.

8 Frequently, we have failed to toot our own
9 horns. We have failed to sufficiently publicize the
10 results of our cases and maintain current, accurate,
11 and accessible data.

12 But I think you will find those things are
13 changing. The substantial nature of the states'
14 enforcement accomplishments over the past 20 years is
15 only beginning to emerge as we continue to gather
16 information and build an accurate database.

17 Of course, our resources are and will always
18 be far less than those of our federal colleagues, but
19 having fewer resources makes us thrifty. Maine's own
20 data show that over the past 20 years, we brought 50
21 antitrust actions; 30 of them single-state, and 20
22 multistate.

23 On an annual basis, that translates to two

1 or three cases per year, including one multistate
2 action per year.

3 In his written testimony, Professor DeBow
4 repeats his estimate that, nationwide, 12 state
5 enforcement cases are brought each year. Professor
6 First's more recent tally for some 20 jurisdictions,
7 which includes Maine but does omit at least two
8 states with very active antitrust programs, shows an
9 average of 17 or 18 cases per year.

10 At this point, the significance of the
11 states' collective achievement is not fully
12 ascertainable, but at the end of the day, it will
13 certainly be far greater than critics initially
14 assumed.

15 A second misconception concerns the degree
16 to which the state-federal jurisdictional overlap
17 results in duplication and increased inefficiency,
18 burdens, and delays.

19 In the nonmerger area, the large majority of
20 the single-state actions Maine has brought have been
21 local cases. In most instances, we believe the
22 federal agencies would be poorly situated to
23 investigate and develop those cases.

1 State attorneys general, in contrast, have
2 superior knowledge of local market dynamics as well
3 as local laws. We're on the spot, and we are capable
4 of rapid and efficient response.

5 Multistate nonmerger cases, for the most
6 part, are brought by the attorneys general in their
7 unique role as *parens patriae*.

8 Given the limitations of private class
9 actions and the Federal Trade Commission's rarely
10 used disgorgement remedy, these *parens* cases are
11 hardly duplicative. Rather, they represent a unique
12 contribution to the achievement of core antitrust
13 goals that is of direct benefit to our citizens.

14 Millions of dollars have been recovered for
15 consumers across the country. To the extent that
16 there is any duplication on the non-merger side, it
17 is effectively managed through state-federal
18 collaboration as in cases like *Mylan Labs* and *State*
19 *of Maine v. Maine Health Alliance*. These cases
20 illustrate that.

21 Moreover, the local presence and
22 capabilities of state enforcers actually enhance
23 efficiency and minimize burdens and delay.

1 Now in the merger area, there is concededly
2 more occasion for concern about duplicative
3 enforcement and inefficiency. However, the extent to
4 which the enforcement activity of federal agencies
5 and the states in the merger areas is actually
6 duplicative is unclear. Maine's experience shows
7 federal involvement in only three of the 15 single-
8 state cases--only three of 15 single-state cases in
9 addition to the five multistate cases in which we
10 participated.

11 With the Chair's permission, could I
12 continue for another minute? Thank you.

13 In other words, federal collaboration plays
14 a role in only 40 percent of Maine's merger reviews.
15 Nevertheless, we certainly agree that in merger cases
16 where we do collaborate, the joint federal and state
17 process has at times been somewhat cumbersome and
18 inefficient.

19 However, there has been consistent progress
20 in increasing the efficiency with which states and
21 the federal enforcement agencies work together.

22 This is due, in large part, to the
23 development of the cooperative procedures for

1 conducting joint merger reviews and to the continuous
2 communication between the federal agencies and the
3 states.

4 I should mention that the state of Maine has
5 developed excellent working relationships and valued
6 contacts at both the Federal Trade Commission and the
7 Antitrust Division of the Department of Justice.

8 To be clear, however, there is room for
9 improvement. I agree with Mr. Proger about this
10 problem, how best to enhance cooperation and
11 coordination in the context of the state-federal
12 joint merger reviews: it does merit your attention.
13 It should certainly be the focus of multilateral
14 efforts.

15 However, as a chief law enforcement officer
16 of a sovereign state, I am strongly opposed to any
17 statutory change that limits state jurisdiction.

18 I will finish.

19 I began these remarks by attempting to
20 explore common ground. I hope to have contributed to
21 clearing up some misunderstanding, but we do need to
22 confront the issues that divide state enforcement and
23 its proponents from its detractors, and I submit that

1 the core issue has two aspects:

2 First, does state enforcement pose a threat
3 to federal antitrust policy?

4 And second, do the constitutional values
5 associated with federalism merit continued respect in
6 an antitrust context?

7 The ultimate issue here is federalism. I
8 doubt very much that any of our federal colleagues
9 would view us as a threat and, indeed, we are not a
10 threat. Certainly on occasion we have viewed matters
11 differently than the federal enforcement agencies.
12 Sometimes we provide a local or, if you prefer, a
13 parochial perspective. But parochialism isn't all
14 bad.

15 By the way, to me it means simply concern
16 for what is happening at the local level. In a given
17 merger, for example, we may care deeply about a local
18 anticompetitive impact overlooked by federal
19 enforcers. Or we may decide to prosecute a local
20 non-merger matter that was passed over by our federal
21 counterparts.

22 In other instances, we have frankly
23 disagreed with federal enforcers or enforcement

1 decisions involving national or regional matters over
2 which we have concurrent authority.

3 But independence of this kind--and I believe
4 this is important--whether in a parochial or national
5 context should not be viewed as a threat. Surely,
6 antitrust law need not be a one-party state where
7 central control and orthodoxy are paramount and
8 dissent unacceptable. Insistence on unquestioning
9 acceptance of orthodox antitrust doctrine has never
10 been the American way. In fact, we know the American
11 system of government and law is founded on respect
12 for and acceptance of diversity and pluralism. This
13 is reflected in our unique system of federalism that
14 recognizes the concurrent sovereign jurisdiction of
15 state and federal authorities in many areas.

16 Our system of overlapping antitrust
17 enforcement is rooted in these constitutional values.

18 The real issue is whether, like Justice
19 Brandeis said in the *New State Ice* case, we think
20 there is value in experimentation by the states as
21 laboratories of democracy.

22 Professor DeBow's written submission makes
23 clear his view that, and I quote, "Experimentation

1 threatens national antitrust policy."

2 On behalf of one sovereign state in our
3 federal system, I beg to differ. Rather, I believe
4 state enforcement, experimental or not, has
5 contributed significantly to the seamless responsive
6 and efficient administration of justice, and to the
7 extent that our concurrent authority permits honest
8 doctrinal divergence, the resulting dialogue builds,
9 tests, and strengthens our antitrust policy
10 consensus, and it enhances the legitimacy of the
11 policy making.

12 I thank you very much for allowing me to
13 testify, and I apologize for going over the time.

14 CHAIRPERSON GARZA: Mr. Proger.

15 MR. PROGER: Thank you.

16 When asked to testify here today, I thought
17 about how I could be of some value to this
18 Commission. As I noted in my article, a lot of
19 people who I consider to be much more knowledgeable
20 than me have written extensively in this area.

21 I, on the other hand, have practiced
22 extensively in this area, and I have had the pleasure
23 for most of this year of being in a national

1 multistate merger, and I have been involved in a few
2 of the cases cited by Professor First and others.

3 So in my paper I tried to address some
4 practical considerations that might be helpful when
5 addressing the issue, and I didn't confront the
6 fundamental issue of should the states have a role in
7 a federal system of government.

8 I think it is a very difficult question.
9 But I start off by asking the questions, what is the
10 role of our antitrust laws, and why do we have them.

11 I believe that they are truly a unique set
12 of laws that are fundamental to this country. The
13 free market system is very important, and a key to
14 the success of this nation, and it protects all. It
15 protects everyone with the ability to succeed. And
16 if you have that system, then it seems to me that you
17 have to think about our set of dual or multiple
18 enforcement, and ask, does that serve the ultimate
19 goals?

20 I perceive four enforcers. There are two
21 federal, there are states, there are private
22 attorneys general--that's three. But none of us have
23 mentioned the importance of self-policing that goes

1 on every day when lawyers and clients advise
2 themselves of what they can do.

3 I think it is fairly important in that
4 system and, of course, I would defer to the attorney
5 general sitting to my right, that the laws have a
6 predictability, that they have a certain degree of
7 consistency.

8 Now, as Professor First points out, laws
9 should evolve, and I agree with that. But the
10 antitrust laws in and of themselves are, by nature, a
11 fairly vague, difficult set of laws dependent upon
12 very specific facts, and I think it is an important
13 criterion as we look into the system of enforcement
14 that our laws be predictable.

15 Multiple enforcement that is predictable and
16 is good on a common set of values and is consistent--
17 it's hard to argue that that isn't good. But the
18 real question is, do we have consistent, predictable,
19 good enforcement? And that raises the inevitable
20 question of, do the states have the resources to
21 engage in this enforcement?

22 I think the states have recognized the
23 problem, and through NAAG, the compact, and the

1 multistate task force, have attempted to deal with
2 some of the issues that they confront in this.

3 But it is still true today--and this is not
4 with any disrespect to any individual state or the
5 men and women who serve in this area--that the
6 resources at the state level are different than at
7 the federal level. And that is something that I
8 think, if the states want to continue to be active in
9 this area, they need to think through.

10 Enforcement needs to be without a tax or
11 burden on the parties. Enforcement needs to be
12 efficient, in my view. And it needs to be
13 predictable.

14 We, more than anything else, are a nation
15 that values self-policing, and we value respect for
16 the law. If the law has so many different views or
17 is so complicated that it's hard to determine what is
18 correct, that, in my mind, is not helpful.

19 That doesn't mean that multiple enforcement
20 has to have that. I think the states could do
21 several things to enhance the situation.

22 One, I think they need to look at the NAAG
23 merger guidelines and either repeal them or bring

1 them current with current law. Frankly, most states
2 tend to follow the federal guidelines, anyway, and
3 not the NAAG guidelines. So if they are going to
4 have them, they need to take a hard look at them.

5 Two, states, again with all due respect to
6 our system of federalism, notwithstanding the
7 compact, still act very individually in the
8 investigations. There needs to be better intrastate-
9 interstate coordination. Maybe some beefing up at
10 NAAG and having some career people at NAAG that
11 develop specialized expertise might be helpful.

12 Each state has its own confidentiality
13 statute. It is a separate negotiation. Maybe NAAG
14 could take a lead in drafting model statutes that the
15 states then could choose to adopt--if the
16 legislatures pass them--so there would be
17 consistency, and one state could act for all.

18 I also want to just end, because I see the
19 limit on the time, by pointing out, as I did in my
20 article, that I think we need to separate mergers
21 from other enforcement. Clearly, in *parens patriae*,
22 the states, first of all, are going to the court, so
23 there is some consistency. They have remedies not

1 necessarily available to the federal government.
2 *Nine West* and other cases show examples where I think
3 the states have done enforcement in a way that
4 benefited consumers and, frankly, benefited the
5 respondents. *Nine West* was a case, in which,
6 frankly, the states knocked out a class action
7 brought on behalf of a class by plaintiffs'
8 attorneys. I think the *parens patriae* action was a
9 superior action and benefited consumers.

10 So I see my time is up. I will conclude
11 there. But I do think that you are faced with a
12 difficult question in our system of federalism, but I
13 think that there is a lot we can do here to improve
14 it.

15 CHAIRPERSON GARZA: Thank you. Professor
16 First.

17 PROFESSOR FIRST: Thank you, Madam Chair,
18 and thank you, Commissioners, for inviting me here
19 today to discuss state antitrust enforcement. I will
20 summarize my statement and then hopefully we will
21 have some interesting discussion, I assume.

22 As I assume you all know, I teach law at New
23 York University Law School, but I did take a two-year

1 leave at one point to head up the New York State
2 Antitrust Bureau, so maybe I'm an example of how a
3 little knowledge can be a dangerous thing.

4 In my written statement to the Commission, I
5 have tried to provide some historical and theoretical
6 background for assessing state antitrust enforcement,
7 along with a preliminary study that I am working on
8 in the actual scope of state antitrust enforcement
9 today.

10 So first, with regard to historical
11 background, I would emphasize that state antitrust
12 enforcement needs to be considered in the context of
13 a rich history in the United States of using multiple
14 institutions of antitrust enforcement, and in
15 particular I would point to the early period of
16 antitrust, starting in 1890, when the Attorney
17 General was given jurisdiction to bring suits under
18 the Sherman Act and private parties were given a
19 private right of action, and ending in 1914 with the
20 creation of a second federal antitrust enforcement
21 agency, the Federal Trade Commission.

22 Congressional action in 1890, and
23 particularly in 1914, was taken against the

1 background of some very robust state enforcement,
2 often undertaken against the same trusts that were
3 targets of Justice Department action.

4 Congress understood in these formative times
5 that antitrust would benefit from multiple
6 institutions of enforcement, and this included state
7 antitrust enforcement.

8 Second, with regard to the theoretical
9 justification for multiple enforcement, I would
10 emphasize that competition in antitrust enforcement
11 can bring benefits similar to the benefits of
12 competition in product markets, disciplining
13 providers and helping to bring about an optimal level
14 of enforcement.

15 Setting up a competitive enforcement
16 structure is more likely to produce good results than
17 the establishment of a monopoly provider of antitrust
18 enforcement.

19 Third, my empirical study: the study was
20 based, as I indicated, primarily on cases assembled
21 by NAAG's antitrust task force, and I want to thank
22 them again for allowing me to draw on that database.

23 I want to emphasize that the data are still

1 preliminary and that a count of the states actually
2 included in the database to this point is only 24 of
3 the possible 56 jurisdictions, and contrary to what I
4 put in my written testimony, this does include Maine.
5 So my apologies, General Rowe; you are in there.

6 Now this means that there is certainly an
7 undercount in my study of state enforcement, although
8 I can't say how substantial that undercount is.

9 The overall conclusion of my empirical study
10 is that the negative story on state antitrust
11 enforcement is not supported by the data, and I'll
12 present six points for the study.

13 One, state antitrust enforcement is more
14 substantial in numbers than many critics say, and
15 this is set out in Table 1.

16 Two, there is a greater use of state courts
17 than most observers had thought or most talk about.
18 State enforcement is not just a *parens patriae* story,
19 and I think General Rowe made that point again.

20 Point three, state involvement in what I
21 call complementary enforcement with the federal
22 agencies--that is, enforcement that makes some use of
23 federal effort--is far less frequent than the free-

1 rider epithet would suggest.

2 Table 3 shows that more than 70 percent of
3 state enforcement is done by the states without
4 federal effort.

5 Point four, the level of state enforcement
6 is, as might be expected, less than federal agency
7 enforcement but not that much less actually than the
8 numbers of cases brought by the FTC.

9 And in five of the 10 years studied, more
10 than Department of Justice civil enforcement
11 actually, and that is set out in Graph 1.

12 Point five, states do a fair amount of
13 merger enforcement, as we all know, roughly about a
14 third of the cases brought, sometimes more, but the
15 states' antitrust concerns are far more varied. Most
16 of the problems that give rise to antitrust suits are
17 horizontal, with price fixing and bid rigging leading
18 the pack. But interestingly, the states pay more
19 attention to monopolization issues than apparently
20 the Department of Justice, as shown in the
21 Department's enforcement data; Justice has filed no
22 monopolization cases since 2002.

23 Sixth point, I think we should be concerned

1 about the overall level of antitrust enforcement,
2 which is not keeping up with the growth in our
3 economy. This is true for federal and state
4 enforcement, although the decline in state
5 enforcement against the growth in the economy is less
6 precipitous than the decline in federal enforcement.
7 At least when measured against the size of the
8 economy, we are more likely to have under-enforcement
9 than over-enforcement.

10 So, the policy conclusion is this:

11 One way to modernize antitrust enforcement
12 is to invest in it, upgrade the enforcement effort.
13 State agencies are clearly under-resourced. More
14 resources would allow the states to engage in better-
15 informed and more effective enforcement.

16 Now there may be a number of ways to provide
17 this capital infusion, but one way may be to make
18 clear that a portion of federal Hart-Scott *parens*
19 *patriae* recoveries should go to the states for state
20 antitrust enforcement.

21 Thank you very much.

22 CHAIRPERSON GARZA: Thank you. Professor
23 DeBow.

1 PROFESSOR DeBOW: Thank you, Madam Chairman.

2 I would like to thank the Commission as well
3 for the invitation to be here today. It is quite an
4 honor to speak on the topic.

5 My name is Mike DeBow. I teach at the Law
6 School at Samford University, which is in Birmingham,
7 Alabama, and I have been there 18 years, and so my
8 view of this is very much the academic outsider's
9 view of what is sort of an inside-the-Beltway
10 institutional question, and it is limited by that,
11 frankly.

12 My concern is more doctrinal than it is with
13 the actual practice, cooperation, or coordination
14 that goes on between the federal enforcers and their
15 state counterparts. I know a little bit about that,
16 but not enough really to give you a thorough response
17 along those lines.

18 So I guess my function here is to present
19 the sort of structural remedy, if you will, to the
20 question of federal-state coordination, and I have in
21 my written remarks taken the position that I think,
22 in a perfect world, Congress would pass a statute
23 that would preempt the states substantively in the

1 antitrust realm, both in terms of the state antitrust
2 statutes as well as the state "little FTC act," which
3 I think would have to be addressed.

4 I also think it would make sense for
5 Congress to consider repealing the *parens patriae*
6 authority or, in the alternative, to provide for a
7 closer federal-state clearance procedure for the
8 states bringing such suits.

9 I say this for three reasons:

10 First of all, in terms of federal
11 constitutional law, state antitrust law is simply an
12 anachronism. It is a hold-over from the late 19th
13 century when the Supreme Court's reading of the
14 Commerce Clause was much narrower than it is today,
15 and, conversely, the definition of intrastate
16 commerce, subject to only the state's regulation, was
17 much wider than it is today.

18 Given the limited view of Congress's
19 commerce power as of the Sherman Act's adoption in
20 1890, a dual system was virtually a constitutional
21 necessity. State antitrust law was directed at local
22 violators, while federal antitrust law could reach
23 business behavior that restrained interstate trade.

1 However, the Supreme Court's post-1937
2 expansion of the congressional commerce power
3 cancelled the need for this division of labor between
4 state and federal enforcers and rendered state
5 antitrust statutes almost entirely redundant.

6 As a constitutional matter, of course, this
7 remains the case today. State antitrust statutes are
8 simply a vestige of an earlier age.

9 Secondly, the states' involvement in
10 antitrust, I believe, threatens the coherence of the
11 national antitrust policy that has developed over the
12 past 25 years by successive Republican and Democratic
13 presidential administrations. Antitrust policy
14 experimentation at the state level in the form of
15 either the enforcement activities of the state AGs or
16 the decisions of state courts applying state
17 antitrust statutes poses a threat to national
18 antitrust policy, and I think this is the most
19 significant cost of continuing the role of state law
20 and state enforcement.

21 Thirdly, the states' involvement in
22 antitrust today has not been particularly significant
23 in overall terms, whether measured by the number of

1 cases brought or additional enforcement resources
2 brought to bear.

3 I was glad to see Professor First and NAAG
4 continuing to augment our knowledge of what goes on
5 at the state level. My earlier publication certainly
6 disclaims the status of the final word on that topic.
7 It is hard to count cases, as everybody here probably
8 knows, and so--but I think, even in light of
9 Professor First's numbers, I think I would stick to
10 that conclusion. It is still not, it seems to me,
11 significant when compared to the cost of the
12 potential disruption of national policy through
13 inconsistent developments at the state level.

14 I recognize, of course, that any
15 congressional proposal to amend the Sherman Act, to
16 do any of this, would be quite controversial, and so
17 there is an alternative in my written remarks,
18 suggesting a procedural improvement in the *parens*
19 *patriae* area.

20 Let me just say quickly, the discussion
21 about state policy experimentation--I think everyone
22 cites Justice Brandeis in *New State Ice*--if you look
23 at the full--the sentence that is usually quoted out

1 of that opinion, Brandeis says, "it is one of the
2 happy instances of the federal system that a single
3 courageous state may, if its citizens choose, serve
4 as a laboratory; and trying novel social and economic
5 experiments without risk to the rest of the country."

6 I just don't think that such risk-free
7 experimentation is really possible in antitrust law,
8 given that every state's economy is interconnected
9 with the economy of every other state.

10 Antitrust policy, if it is to benefit
11 consumers, should be formulated at the national
12 level.

13 I guess in the time that's left, I would
14 like to expand just a bit on the written statement's
15 discussion of the potential for inconsistency among
16 states *vis-à-vis* the federal antitrust policy that's
17 developed over the last 30 years.

18 CHAIRPERSON GARZA: Professor DeBow, it may
19 be possible, just so we can move on, I realize that I
20 gave General Rowe a little bit more time, but I
21 wonder whether maybe you could develop that a little
22 bit more in response to questions. That would let us
23 start to--

1 PROFESSOR DeBOW: Yeah.

2 CHAIRPERSON GARZA: Okay, great. Thank you.
3 Commissioner Warden.

4 COMMISSIONER WARDEN: Gentlemen, thank you
5 all for coming. I enjoyed reading all of your
6 statements, and I wanted to say particularly, General
7 Rowe, that I enjoyed reading, and I'm sure Mr.
8 Ackerman contributed to this as well, the history of
9 antitrust enforcement in Maine, and it is quite a
10 record based on the availability of personnel. So I
11 thought that was really interesting.

12 Mr. DeBow, I have an initial question for
13 you. You are clearly the Lone Ranger here on this
14 panel.

15 PROFESSOR DeBOW: It looks that way, sir,
16 yes.

17 COMMISSIONER WARDEN: I might volunteer to
18 be Tonto, but--

19 [Laughter.]

20 COMMISSIONER WARDEN: Wouldn't your approach
21 throw the baby out with the bathwater in the sense
22 that, how can there be any practical objection to the
23 states enforcing state law or suing as *parens patriae*

1 under federal law against hard-core price fixing and
2 other violations of that type that are primarily
3 local in their impact?

4 PROFESSOR DeBOW: I don't have any problem
5 at all with the states doing that, but to try to
6 segregate that out, in my earlier paper I tried to
7 suggest a reform that would carve that out as a state
8 responsibility.

9 Let me say, I worked for four years very
10 recently in a part-time capacity with the Alabama
11 Attorney General's Office, so I have a good deal of
12 respect for state AGs offices, what they do, the
13 people who work in them, and so on.

14 Don't take this as--my remarks shouldn't be
15 seen as negative.

16 COMMISSIONER WARDEN: Oh, no, no, no. Of
17 course not.

18 PROFESSOR DeBOW: But there was no interest
19 in the Alabama legislature to try to do this, and I
20 just think, as a practical matter it's not going to
21 work. So the question is, what do you give up by
22 taking the states off that responsibility, which I
23 think they perform very admirably? What is the loss

1 versus the gain from simplifying antitrust law and
2 making it a national, a federal-only area?

3 COMMISSIONER WARDEN: Now if we adopted your
4 suggestion, the possibility of a federal clearance
5 procedure for state actions, would your provision
6 specify factors in the statute to guide the
7 attorneys' general clearance discretion? For
8 example, local impact, the use of an established
9 legal theory, and an acceptable remedy in the eyes of
10 the DOJ?

11 PROFESSOR DeBOW: I hadn't really thought
12 about it to that extent. My immediate reaction is to
13 say that I think that might not be necessary.

14 My purpose in suggesting that was just to
15 try to coordinate the overall state effort with the
16 current federal administration, and I would be
17 willing to leave that to the discretion of whoever
18 sits in the chair in the Antitrust Division and here
19 at the Commission to make that call.

20 COMMISSIONER WARDEN: Okay. Thank you.

21 PROFESSOR DeBOW: For whatever policies they
22 are following.

23 COMMISSIONER WARDEN: Thank you.

1 My next questions are for the other three
2 members of the panel who aren't the Lone Ranger.
3 Each of you makes reference in your written
4 statement, and General Rowe repeated it today, not
5 only to federalism as a basic value of this country,
6 but also to experimentation or divergent enforcement
7 philosophy as a positive good resulting from the
8 present system.

9 Now my first question is this: Would each of
10 you agree that, as to price fixing, bid rigging, and
11 other such hard-core violations, these considerations
12 are beside the point, because no more experimentation
13 is needed?

14 PROFESSOR FIRST: Actually, of course,
15 that's--who wouldn't agree that we all agree on those
16 being hard-core violations? But, in fact, it does
17 help to illustrate what the experimentation is about,
18 because one of the important areas, I think, in which
19 states have experimented or done something different
20 from the federal government is in the remedies part
21 of those cases, where the states have pushed very
22 aggressively to bring relief, to bring remedies to
23 consumers, whether it's through the passage of state

1 indirect purchaser statutes or other sorts of
2 contractual things that are put into state bidding
3 contracts.

4 There is a real effort to check on whether
5 the decision in *Illinois Brick* was a sensible one,
6 and I think this is an area--it's not doctrine in the
7 sense of, should we apply the Rule of Reason or not,
8 but it's quite important to how antitrust gets done,
9 and how it works. And this is an area I think in
10 which the states have clearly done things that the
11 federal government hasn't, and have to some extent
12 pushed the federal government, at least the FTC, to
13 consider disgorgement.

14 COMMISSIONER WARDEN: Well, we had a whole
15 hearing on the indirect purchaser doctrine.

16 PROFESSOR FIRST: Yes, I know.

17 COMMISSIONER WARDEN: And I don't regard,
18 myself, that experimentation as being a positive one.
19 I think the current system is a mess. I'm not saying
20 how it ought to be fixed, and I don't think that
21 inclusion of contract provisions in state bidding
22 documents has really anything to do with antitrust
23 law.

1 Mr. Proger, would you accept the proposition
2 I stated, that no experimentation is needed as to
3 hard-core violations?

4 MR. PROGER: Yes, I think I would agree with
5 that. I would just add that I'm not sure I would
6 agree with the proposition that divergence on
7 enforcement is a particularly good idea. I think,
8 though, we have to be
9 careful--and I want to make sure I'm answering your
10 question. I think there is a lot in what we all
11 commonly understand to be hard core, and I think hard
12 core is a fairly limited part of the antitrust
13 enforcement fabric, as cases like *Maricopa*, *NCAA*, and
14 the *Indiana Federation of Dentists* show, that even in
15 section 1 or FTC section 5 cases, if you are outside
16 of hard core, there are areas that are less
17 predictable, but within hard core, yes.

18 COMMISSIONER WARDEN: General Rowe?

19 ATTORNEY GENERAL ROWE: In those areas,
20 there is less divergence, I would say, but I just
21 want to make the statement that when I talk about
22 divergence as a positive, most times there isn't
23 divergence. In most cases we are aligned with the

1 federal government, either the FTC or the Antitrust
2 Division is working with our office. To the extent
3 we get involved early with one another, we have great
4 efficiencies.

5 You know, the *Microsoft* case is a big case
6 out there that brought this divergence, where you had
7 nine states continue after the federal government
8 stopped, and there was benefit to those nine states
9 continuing in the final remedy, I believe.

10 So you had divergence there that I think was
11 a plus for the consumers in this country and in the
12 various 50 states. So I just want to say, when I
13 talk about diversity being a positive quality, and it
14 can be, it's not the norm. In most cases, we are
15 aligned, and I wanted to emphasize that.

16 With respect to consistency, Mr. Proger
17 talks about that predictability. Listen, I agree,
18 and that's why we work together as much as we do, and
19 this argument that somehow the federal government
20 practices transparency and the states opaqueness, I
21 disagree strongly with that.

22 We put our cases up on our website. We are
23 going to do a better job telling the reporters about

1 them, but everybody knows we use the federal merger
2 guidelines. If folks want to know how we evaluate
3 antitrust situations, we do our best to tell people,
4 so there are no secrets at the state level. I think
5 it's out there, and I think most people who work with
6 us understand that and would agree with me on that.

7 COMMISSIONER WARDEN: Thank you. I think
8 you might realize that others don't necessarily share
9 your view of the value of having nine states litigate
10 on the *Microsoft* case to essentially the same result
11 that the government had already reached. But that is
12 a good lead into my next question, which is, let's
13 take a look at areas that aren't clear, and I want to
14 use two recent cases on the international level to
15 discuss this.

16 First, *Microsoft*, but the divergence here is
17 between the U.S. and the U.K., not the states, and
18 *GE-Honeywell*. We have a section 2 case and a merger
19 with divergent results in the U.S. and the EU.

20 Now those are two big, the only two really
21 big developed capitalist markets, the United States
22 and the European Union. But under the approach you
23 advocate, wouldn't each of the 50 states have the

1 power to, in the case of *Microsoft*, cause design
2 changes in its software to suit the policy wishes of
3 that state; or, in the case of *GE-Honeywell*, to
4 prevent a merger on a global scale because of the
5 thought that it has some undesirable impact contrary
6 to the policy views of a particular state? The
7 states would be free to do that under the approach
8 you advocate, wouldn't they?

9 PROFESSOR FIRST: If I could just--in part,
10 it's very difficult to answer your question, because
11 I'm not certain under what statute you are assuming
12 these cases are brought. So if you are asking me
13 whether or not --

14 COMMISSIONER WARDEN: We'll get to that in a
15 minute, but go ahead.

16 PROFESSOR FIRST: I know, but I think it
17 does make a difference, and in some ways it makes the
18 argument easier within the United States than it is
19 in an international setting.

20 So if it's the Donnelly Act, could the suit
21 against *Microsoft* have been brought under the
22 Donnelly Act and the same relief that the Department
23 of Justice and the litigating states at that time

1 asked for, which is restructuring--could a state
2 court have brought that--have decided that?

3 Frankly, I don't know the answer to that
4 constitutionally, so I think --

5 COMMISSIONER WARDEN: Nor do I.

6 PROFESSOR FIRST: Right. And that may be
7 the reason why we don't see those cases. Those cases
8 are brought by the states under federal law in
9 federal court. So if the question is, could a single
10 state bring a suit against GE-Honeywell in federal
11 court and ask for some relief, the answer is yes, if
12 that's the relief that is permissible under section 7
13 of the Clayton Act. It seems to me it's the same
14 legal question as if the Department of Justice
15 brought the case, or the Federal Trade Commission
16 brought the case, or if it was brought by multiple
17 states, which big cases like that almost always are
18 because the states are swamped in terms of resources.

19 So in the United States, it seems to me part
20 of the way of dealing with that is that these cases
21 are brought as *parens patriae* cases by the states.
22 Of course, those hypotheticals haven't quite
23 happened, anyway. But they would be brought in

1 federal court, and the answer would be decided as a
2 matter of federal law.

3 COMMISSIONER WARDEN: Well, you know, in the
4 *Microsoft* case that the state statutes were before
5 the court under pendent jurisdiction and were
6 insisted upon as a source of substantive law by the--

7 PROFESSOR FIRST: But the penalty there was
8 a monetary penalty that was sought and it was never
9 pressed actually at the end, as you know. So it was
10 not--no one ever asserted that independently, under
11 each of the 20 states' laws, somehow the federal
12 court could use those to enter the structural relief
13 that was sought.

14 So I think, again, to me the answer is, this
15 is going to be decided by federal courts. To the
16 extent that we are concerned about uniformity, these
17 cases are brought in federal court, and federal
18 courts--well, they are not perfectly uniform, either,
19 as we all know. Uniformity can vanish from circuit
20 to circuit even under federal law. But at least
21 there is that federal law which will govern.

22 COMMISSIONER WARDEN: Now the Supreme Court
23 has said, despite some of the statements in the

1 statements submitted to us, such as General Rowe's,
2 which talks about prosecutorial action by the state,
3 that the states don't sue under federal law as law
4 enforcement agencies; they sue solely as private
5 parties. Isn't that correct?

6 PROFESSOR FIRST: It's --

7 COMMISSIONER WARDEN: Yes or no. Please.

8 PROFESSOR FIRST: Yes or no.

9 [Laughter.]

10 PROFESSOR FIRST: Under *Georgia v.*
11 *Pennsylvania Railroad*, I think the answer was they
12 were suing as *parens patriae*. It was decided in the
13 original jurisdiction of the Supreme Court. The full
14 bases of that weren't plumbed, but the Court was
15 clearly looking at the state of Georgia in its
16 sovereign capacity suing for injury to its economy.

17 Now if you are referring to the later merger
18 cases like the *American Stores* case, there is
19 language about suing under the Clayton Act. We view
20 them as private parties because the states put that
21 case, when they put that case, they argued--they
22 said, you know, private parties, anyone suing under
23 this statute, should be entitled to seek divestiture,

1 and the Court said yes.

2 So, in that sense, I say yes and no. And I
3 think there is still some tension in that. But--

4 COMMISSIONER WARDEN: Well, I think we could
5 spend a full afternoon on the *parens patriae* standing
6 in equity, and I don't want to go there, because I
7 think my view is, it's pretty clear, and the Supreme
8 Court will keep it pretty clear when it gets a
9 chance.

10 ATTORNEY GENERAL ROWE: Could I --

11 COMMISSIONER WARDEN: Yes, would you answer
12 my original question?

13 ATTORNEY GENERAL ROWE: About the two cases
14 you raised, and about the states? The states have
15 historically filed in these multistate actions
16 involving large corporations in federal court. You
17 are right. There have been pendent state claims that
18 have been there.

19 If you were to recommend to Congress, and if
20 Congress amended the law so that we could not bring
21 actions under federal law anymore, you would see
22 these cases, more than likely, at least in some
23 states, being brought only in state courts with state

1 causes of action. And I would ask you if Microsoft
2 would like that? Would Honeywell like that? I don't
3 think so, unless you follow Professor DeBow and you
4 repeal everything and you preempt the entire area.

5 If you do that, we are going to have a lot
6 of antitrust violations that go unattended because
7 most of the stuff we work on, the FTC doesn't get
8 involved with, the Department of Justice doesn't get
9 involved with, because it's too small. It's local;
10 we understand it better.

11 So what I'm trying to say, Commissioner
12 Warden, is that we understand the issues about
13 uniformity, about predictability. That's why we have
14 tried to work with the federal government. And I
15 think there are some things that we could do to
16 improve it, but I just would ask you to think about
17 that, where you would go with that.

18 COMMISSIONER WARDEN: Well, let me ask this,
19 if the federal government has acted, and there is not
20 a free-rider accusation, by the way, but if the
21 federal government has acted, what need is there for
22 the states to work cooperatively with the federal
23 government on that matter?

1 ATTORNEY GENERAL ROWE: In some cases, you
2 know, the states don't get involved because the
3 federal government is acting. It's when we believe
4 that there is a reason to get involved in the
5 investigation, or because we don't believe, perhaps,
6 that the federal government is serving all of the
7 best interests of the citizens of our state. But in
8 many cases we are not involved; the states are not
9 involved. In some we are involved.

10 And where we are, most all the time we are
11 working closely together. I think *Microsoft* has been
12 brought out and has been used as the example. I'm
13 just saying there was some good in that. I know we
14 disagree about what happened in that case, but we do
15 live in a--federalism is--I mean that's the model of
16 government we have here, and these are sovereign
17 governments, but they try to work as well with the
18 federal government as possible.

19 I want you to know that because we do.

20 COMMISSIONER WARDEN: I appreciate that as a
21 statement of fact that normally applies. I accept
22 it.

23 But with respect to matters going unremedied

1 or the federal government not being vigilant, put
2 aside the local conspiracy that the federal
3 government doesn't notice and is happy to have you
4 deal with, or your colleagues in the other 49 states
5 deal with. If we are looking at a truly national or
6 international situation, be it a merger or a type of
7 conduct that's inherently interstate or
8 international, isn't the decision of the Attorney
9 General or the Assistant Attorney General in charge
10 of the Antitrust Division not to bring an action or
11 to seek only a particular form of relief exactly the
12 kind of law enforcement decision that Article II of
13 the Constitution commits to the President and not to
14 the states?

15 ATTORNEY GENERAL ROWE: Well, when you say
16 "law enforcement decision," I'm going to have to
17 research the issue talked about under *parens patriae*
18 as--opposed to bringing those. I mean I don't know
19 the exact way you worded that--whether I could answer
20 that.

21 I do believe we have an obligation as
22 attorneys general to protect competition in our
23 states, so that the federal government doesn't have a

1 complete monopoly on that role. But I don't know if
2 I can --

3 COMMISSIONER WARDEN: Well, let me be clear.
4 I read the *parens patriae* decisions of the Supreme
5 Court, and I read them to be very clear in this
6 respect: they confer the right on the states to sue
7 in equity *parens patriae* only in cases in which the
8 economy of that state suffers some injury that is
9 different, distinct, or sole, as opposed to the rest
10 of the country and the rest of the world.

11 So that is suing to protect your economy, to
12 protect your state. But to take an international
13 merger--I'll stay away from *Microsoft*--and state X
14 doesn't like the effects in state X of that merger,
15 but both the U.S. authorities and the EU authorities
16 and the Brazilian authorities and so on have all
17 said, okay, already--and leave aside the question of
18 legislative jurisdiction, which is serious as to the
19 state law--but suing under federal law, and claiming
20 some particularized injury in your state and the
21 right to stop it. Does that make any sense?

22 ATTORNEY GENERAL ROWE: It may. I think
23 your question is, can you do that? And I believe you

1 can. Now you are maybe more learned on the specific
2 issue than me, but I believe we can. The question
3 is, does it have to be particularized? Does it have
4 to be different in Maine than it is in New Hampshire?

5 COMMISSIONER WARDEN: I'm assuming it
6 doesn't. Does it make any sense to let Maine bind
7 the world any more than the island of Tobago? As in
8 the old conflicts casebooks?

9 ATTORNEY GENERAL ROWE: As the Attorney
10 General of the State of Maine, I want to have that
11 authority, and I believe if I do, if I believe the
12 federal government is not adequately protecting the
13 citizens in my state in that situation.

14 Now most of the time we don't get involved,
15 but yes, the answer is yes.

16 COMMISSIONER WARDEN: Okay. My time is up.
17 I have many more questions, but Mr. Proger wants to
18 answer, and then I'll quit.

19 CHAIRPERSON GARZA: Phil, can you keep it
20 under five minutes?

21 MR. PROGER: Sure.

22 CHAIRPERSON GARZA: Okay.

23 MR. PROGER: Boy, federalism is messy, isn't

1 it?

2 Let me see if I can respond to Commissioner
3 Warden a little bit, which I think will get me in
4 trouble with everyone, so that's probably good.

5 I think there is a continuum here that we
6 might be able to agree upon. I think, at least in my
7 mind, that the states do have an important role to
8 play in the local conduct, local effects, and I think
9 that even the critics of state enforcement would
10 agree that there are places where the states can play
11 a valuable and unique role. I don't think that is
12 where the debate is.

13 I think the debate is where you focused, and
14 that is where you have multinational or national
15 companies engaging in conduct that affects the United
16 States and other countries across the border.

17 In my view--and I'm not a constitutional
18 scholar--but as I read it, I think the proper answer
19 is that the Attorney General of Maine, if he believes
20 that a company doing business in his state is
21 engaging in conduct that violates his state's
22 statutes, he can bring an enforcement action, and
23 that hasn't been preempted or rendered neutral

1 through the Constitution.

2 I think the *parens patriae* statute has been
3 positive, because I don't think we want companies
4 subjected to 50 separate state enforcement actions
5 under 50 state statutes--but Pennsylvania doesn't
6 have one--but under 50 different standards. I think
7 there is a benefit in *parens patriae*, at least in
8 saying to the states, if you're going to bring the
9 actions, let's bring them under a consistent set of
10 statutes.

11 But that leaves us with a more difficult
12 question, which is, should the states be--and I
13 mentioned this in the paper--should we give the
14 states some deference on localized effects and local
15 issues? Physicians, health care, used car
16 dealerships, something that is more local. But
17 should the states--and the federal government should
18 recognize that. But should the states give some
19 deference to the federal government on major national
20 matters? And is society and antitrust enforcement
21 benefited if the states and the federal government
22 differ on the application of federal law and what the
23 appropriate remedies are under federal law.

1 I do think that, on the whole, that hasn't
2 happened, but when it does happen, it's jarring, and
3 it happened with us with the EU and *GE-Honeywell* and
4 *Microsoft*. It's happened with the states and
5 *Microsoft*. There are a few mergers where that has
6 happened, where the federal government took one view
7 and the states took another. And I think that's the
8 difficult issue.

9 I will say that without saying who is right
10 or wrong in this, because multiple enforcement means
11 that there's multiple enforcers and--look, in our
12 constitutional system of government, there are
13 separate sovereigns with dignity under our
14 Constitution. You can't say that they are second-
15 class. But you do have a fundamental issue, whether
16 antitrust and society is benefited if these multiple
17 enforcers differ on the same set of laws. I think
18 that is a problem.

19 COMMISSIONER WARDEN: How is this more
20 important in terms of the federalism issues than an
21 area that ERISA entirely preempted? Entirely.

22 MR. PROGER: Truthfully, you know, I can't
23 answer that. Congress made a decision in ERISA that

1 they haven't made in the antitrust laws.

2 COMMISSIONER WARDEN: But should they make
3 it in the antitrust laws is what we're here to try to
4 talk about.

5 MR. PROGER: You know, not if the result is
6 that we now have the states applying 50 different
7 state statutes.

8 COMMISSIONER WARDEN: That isn't a result of
9 ERISA; state law has no role at all.

10 MR. PROGER: Although, as you know, I am
11 nowhere near an expert on ERISA, there actually is a
12 fairly vigorous debate on where those lines are.

13 CHAIRPERSON GARZA: Thank you very much. I
14 think if we police ourselves and stick to 10 minutes
15 with every Commissioner, we will be able to have
16 everyone have an opportunity to ask questions and
17 still end on time. So that's the goal.

18 I am fortunate to go next, so let me--I
19 listened, I've read all of the written testimony you
20 have submitted, and I thought it was very thoughtful,
21 and I have listened to what you have had to say
22 today. I wonder whether I could get you to comment
23 on some proposals that have been made, or a proposal

1 that has been made. I think Professor DeBow made
2 something like it and also we received something in a
3 somewhat sketchy form from the ABA, I think, last
4 week in comments.

5 But imagine a system in which using the
6 existing cooperative framework between the federal
7 and state enforcers that exists today, there was some
8 kind of federal right of first refusal. Assume that
9 the federal government would have the first option to
10 investigate anything over which it would have
11 jurisdiction because it's in interstate commerce, and
12 I realize that's broad, but that it could also seek
13 the assistance of state AGs or request that a state
14 AG or a group of state AGs handle a matter, or could
15 accede to requests that a state AG or a group of
16 state AGs handle a matter. So there was a kind of a
17 domestic competition network website some place and
18 there was a way to communicate with each other about
19 investigations or complaints and to coordinate, and
20 to essentially allocate on somewhat of an *ad hoc*
21 basis, but with the presumption being that anything
22 that the federal government kept would be preempted
23 under both federal and state law, including a

1 decision not to prosecute.

2 In addition, imagine that if a state or
3 states took--that the federal government couldn't
4 seek to dismiss an action in court, for example, but
5 that any settlement that would have a material effect
6 outside a particular state would have to be approved
7 by a court, and the federal government would have an
8 opportunity to comment, and the Court would be
9 required to give deference to the views of the
10 federal government, and the federal government would
11 have a similar right to come in to the Court on any
12 proposed injunctive relief, again, that would have a
13 material effect outside the state.

14 The reason I suggest this framework is that
15 it seems to address, to some extent, some of the
16 concerns that have been raised both about
17 centralization and about decentralization of
18 enforcement. It seems like it might help to address
19 the issues of local competencies, the concern that
20 federal enforcers might miss something. It might
21 better enable the use of scarce resources, but at the
22 same time it might help us to address externality
23 problems, and it might also help to address the issue

1 of policy divergence and essentially help to
2 coordinate on policy, at the same time as allowing
3 for some amount of experimentation in how things are
4 investigated and how things are remedied, and to pool
5 resources.

6 That may be more complicated than is
7 possible to really address off the cuff, but I wonder
8 if each of you could identify things that we would
9 have to consider or flesh out, as the ABA had in
10 their comments, actually invited us to consider. But
11 what do you think of the general framework? What are
12 the things we should consider that would be important
13 to help it function? And, if you disagree, what it
14 would address some of the issues that you all have
15 raised?

16 Can I start with Attorney General Rowe?

17 ATTORNEY GENERAL ROWE: Well, I'm the
18 attorney general for a state, a sovereign state, and
19 I speak for the state of Maine. I do not think that
20 is a good idea. I subscribe to the federalism
21 principles. We are a sovereign government. In that
22 case it is the federal government that is deciding
23 whether you can play or not. Unless they preempted

1 state law, and then even if the federal government
2 decided it was going to take the case, arguably a
3 state could file a suit in state court under state
4 law.

5 So I question this whole thing. I'm just
6 wondering, what's broken? I guess that is my
7 question today. We are trying to fix something, and
8 there have been a couple of cases that seem to have
9 caught everybody's attention, but I think if you talk
10 to the practitioners--one thing I will say, one of
11 the problems is sharing information, and under Hart-
12 Scott-Rodino, as we know, the pre-merger filings by
13 companies, the federal agencies cannot share that
14 information with states.

15 One thing you might want to consider is
16 amending or proposing Congress amend
17 Hart-Scott-Rodino to allow the FTC and the DOJ to
18 share that information with states. We would have to
19 be bound by the confidentiality provisions under that
20 statute, but that would get us way ahead in terms of
21 working together from the get-go and having the
22 information.

23 As you know, now we have to subpoena, and we

1 don't know what is going on with the federal
2 agencies. So that's a way that--I'm speaking for one
3 state--that's a way that would make it easier for us
4 to find out what's going on, and then perhaps you
5 wouldn't see this competition.

6 Apparently people don't like the competition
7 between the enforcers, and I understand that. I
8 think it's probably a good thing in some cases. Some
9 of you do, some of you may not. But if you don't
10 like it, this may help because it seems to me that
11 the more the states know and are comfortable with
12 what the federal government is doing or not doing,
13 more likely they will be to back off.

14 CHAIRPERSON GARZA: Just so I understand, if
15 we have something like that, which is maybe, in part,
16 a more formalized institution than what already
17 occurs today, as I understand it, what do you think
18 the state of Maine, for example, would then be not
19 expected to do that it's doing now? I mean--

20 ATTORNEY GENERAL ROWE: If you want to use
21 the word burden, we wouldn't burden these
22 corporations with subpoenas and CIDs and all that
23 stuff.

1 CHAIRPERSON GARZA: No, I'm going back to
2 the proposal of the notion that there be an
3 opportunity for federal preemption if the matter
4 wasn't something that was primarily local.

5 So, in other words, I assume that you
6 wouldn't expect, for example, to see a situation in
7 which there was a purely local or sort of a local bid
8 rigging or something that was really localized to a
9 region or a state, where the federal government would
10 say we want to preempt this area. You would expect,
11 perhaps, to see continued allocation and sharing of
12 resources, or maybe you'd have a situation in which
13 the federal government, because it has greater
14 resources, would undertake it primarily but with the
15 assistance and working in coordination with the
16 state.

17 So the only difference would be that there
18 might be an instance in which the federal government
19 would preempt an area because of the nature of the
20 conduct or the transaction having a broad effect on
21 the national economy, where it was more appropriate
22 to have a national approach.

23 So the question is, what is it about

1 something that institutionalizes that process that
2 bothers you? Is it the sort of, just the--is it the
3 perception that it's just undermining sovereignty,
4 and you think it's better to do it voluntarily than
5 to have Congress say, basically, this is how we want
6 antitrust, national antitrust policy to be
7 implemented? Or is there something else, something
8 that you are afraid the states would not be able to
9 enforce under that kind of situation?

10 ATTORNEY GENERAL ROWE: Well, again, I don't
11 think anything is broken here, but I do think that
12 what you say is multinational or national still has
13 effects within my state. So if it's a multinational
14 corporation selling products or services in my state,
15 it has a local effect, just as if it's in-state; I
16 mean the effect is the same. And if consumers are
17 being ripped off because there's collusion, there's
18 price fixing, there's a merger that's going to create
19 a monopoly or near monopoly, I care about that.
20 Whether it's someone from the outside or someone
21 within. So it doesn't mean any less to me who the
22 players are, I guess is what I'm saying, as a
23 sovereign. I look within my state.

1 I mean you're going to hear this from me
2 and, I assume, a lot of other AGs, and it's not
3 because we're crazy. It's being we're state
4 attorneys general. We really believe the United
5 States of America--I mean we're a nation of states.
6 We are united. But we have 50 sovereign states and a
7 central government, and we work together, and I think
8 that's really important.

9 I guess I would just say there are
10 ways--I mentioned amending Hart-Scott-Rodino--there
11 are ways you maybe could facilitate this to create
12 less of a burden on us and perhaps on mergers or
13 folks who want to merge. But I would hate to see any
14 of this--any of the authority taken away from states
15 when I don't believe that there is a major problem.

16 Even if there is, one of these days--and I
17 wasn't going to go here today, but we have been
18 accused, AGs have been accused of being political.
19 In other words, you know, sometimes we want to make a
20 name for ourselves. It's not like that. The
21 antitrust investigations start at the bottom, and
22 they come up through the staffs, and I believe that's
23 true in every office around the country if you look.

1 We don't say we want to investigate here, we want to
2 investigate here--they come up. And we keep politics
3 out of it.

4 So I just want to make that point, too. I'm
5 rambling here. I'm sorry. But --

6 CHAIRPERSON GARZA: Well, just before the
7 light turns red, does anyone else want to say
8 anything about the--Phil?

9 MR. PROGER: Very quickly. I think the EU
10 has a similar concept, which is of the nature of a
11 community dimension. I think the challenge would be
12 to define the workable standard, but if we could come
13 up with some system where it was recognized that
14 something really impacted the country as a whole and
15 commonly, it might make some sense to do that.

16 I do think, as General Rowe points out, that
17 unless--and I don't mean to suggest that he's
18 suggesting this--but unless you preempted state law
19 in this area, you wouldn't have accomplished
20 anything.

21 I think it doesn't deal, Chair Garza, with
22 the more difficult question, and that is part of the
23 divergence here, which is, there are times when the

1 states as separate sovereigns have felt that the
2 federal sovereign was not properly or correctly
3 enforcing the law, and certainly after Assistant
4 Attorney General Bill Baxter, who I think history has
5 shown was correct, but certainly after his 1982
6 Guidelines, there was a state reaction that got the
7 states into this area. And we don't address that
8 question.

9 One quick last point. I wouldn't object to
10 the amendment to HSR, but I would point out as a
11 practical matter, that parties routinely waive that
12 and provide the information in mergers, so I don't
13 see that as a practical problem today.

14 CHAIRPERSON GARZA: And I think the proposal
15 that I talked about actually was meant to deal with
16 the divergence in policy, essentially preserving a
17 national policy, I think.

18 MR. PROGER: I think that would be good.

19 CHAIRPERSON GARZA: And I am passing the
20 baton on to Jonathan Yarowsky.

21 COMMISSIONER YAROWSKY: Hello. I would like
22 to kind of use my time to kind of move from the
23 conceptual to the empirical. Professor DeBow, I'm

1 going to start with you, only because I think a lot
2 of your analysis was very interesting. It kind of
3 stays at that level.

4 You know, if antitrust--if the issue of
5 interstate commerce, which has evolved, makes that
6 issue an anachronism in the antitrust area, it almost
7 makes it an anachronism in every area of law. If you
8 look at the crime bills passed since the late '80s,
9 juvenile justice issues are now done in federal
10 court, domestic law could be interstate commerce.

11 I mean, so that argument to me is less
12 compelling. I think it's an observation; I think
13 there's been--but if you really look at the
14 federalization of state law in so many subject matter
15 areas, it kind of takes antitrust out as kind of an
16 anomaly. Because it's happening everywhere. That's
17 the first point.

18 The second point, at least that I see, and I
19 want you to respond, is that in the area of
20 experimentation, the state laboratories of
21 experimentation, if in fact the concern is that maybe
22 some creative theory or use of theory would lead to
23 some non-consumer welfare result, that's already

1 happened in the federal antitrust laws. There's 31
2 exemptions from the antitrust laws. All of those
3 exemptions, for the most part, are not based on
4 consumer welfare. They are based on other types of
5 issues.

6 So in a sense at the federal level that one
7 might venerate, we are fraught with non-consumer
8 welfare analysis. We are forced--we are constricted.

9 I think lastly, just from my standpoint, and
10 then I want to kind of move to the empirical, because
11 I like the ideas that I hear coming out, and maybe
12 there is a practical way to try to reach a
13 homeostatic mechanism between the federal and state
14 governments.

15 I think we also have to be careful with the
16 idea that a novel idea is necessarily frivolous. You
17 know, a waste of time to the system, or that it could
18 create problems, because I think orthodoxy tends to
19 go in cycles. I agree really with Commissioner
20 Warden's line of questioning. I think he was trying
21 to establish a baseline. I think that's useful in
22 the hard-core areas, but even that had some
23 variations.

1 But if you really look, there's a sense to
2 the substantive fabric of the antitrust laws. I mean
3 I think even though there is a lot of turmoil with
4 vertical issues in the '80s, it kind of calmed down,
5 reached more or less a consensus.

6 You know, with a lot of the vertically
7 integrated mergers that we are seeing in the
8 telecommunications area, where distribution and
9 content are controlled by a single company--I'm not
10 railing against that. You can call it *Keiretsu* or
11 you don't have to call it *Keiretsu*. Maybe it's the
12 same as widgets, maybe not.

13 But the point is, I see kind of a vibrant
14 discussion coming down the road on that issue that I
15 thought was pretty well settled for most of us.

16 So I mean, again, the orthodoxies kind of
17 rule. So do you really think that we should--you
18 made a very provocative analysis from a conceptual
19 standpoint. Do you really think those should be the
20 guideposts that we should try to base our analysis
21 on, as opposed to try to look at the empiricism?

22 PROFESSOR DeBOW: I'm sorry, what
23 guideposts?

1 COMMISSIONER YAROWSKY: Well, the guidepost
2 about interstate commerce being an anachronism, that
3 if you have an experimental theory that's somehow
4 going to maybe deviate
5 from --

6 PROFESSOR DeBOW: Oh, okay.

7 COMMISSIONER YAROWSKY: All the three
8 central points that you made.

9 PROFESSOR DeBOW: I guess I put more stock
10 in orthodoxy than you do, perhaps. Business people
11 need reasonably clear statements about what's
12 appropriate and what is inappropriate, and when
13 antitrust enforcement agencies get creative, there's
14 a risk to the economy and to consumer welfare as a
15 result of that.

16 What I had in mind writing this, and it was
17 a phrase I should have used in the written statement,
18 but it didn't occur to me, the phrase "the mothball
19 fleet of antitrust." It's sort of older decisions
20 that kind of never have been overruled, but they are
21 not really used much anymore. You could construct, I
22 suppose, an alternative antitrust universe out of
23 disused Supreme Court cases that would revolutionize

1 the American economy.

2 I just don't think--and this is just my
3 personal view on this--that that's the function of
4 the antitrust agencies or the courts hearing
5 antitrust cases. I don't think that is consistent
6 with Congress's intent.

7 COMMISSIONER YAROWSKY: But do you think
8 that cases like *Brown* would be in that fleet?

9 PROFESSOR DeBOW: Uh-huh.

10 COMMISSIONER YAROWSKY: Do you really think
11 state AGs are relying on that case or trying to
12 revive it?

13 PROFESSOR DeBOW: No. And I hope I made it
14 clear in the earlier writing that I did. When I
15 looked at the cases that were brought over that
16 10-year period, the ones that I could find--and it's
17 not an exhaustive list. It's the best I could do,
18 but it's not an exhaustive list--I frankly expected
19 to find more use of older theories, more kind of
20 theories that would allow more social rather than
21 efficiency considerations to be taken account of.
22 But I didn't find that, I mean with just a couple of
23 exceptions.

1 Actually, I was interested to read General
2 Rowe's explanation of that one case involving the
3 fish-packing facility. I'm happy to be corrected
4 about that, about the primary--the state's primary
5 goal there.

6 But I haven't found much evidence of that.
7 There is a fairly lengthy discussion of the
8 litigating states' perhaps local parochial interest
9 in opposing the *Microsoft* settlement in the article
10 by Hahn and Layne-Farrar that I cite. I don't know
11 anything independently of that to corroborate that or
12 undermine it one way or the other. So I mean that
13 might be a fairly significant exception to what I'm
14 saying, which is, no, I don't find that there's been,
15 up to now, much actual harm from that.

16 All I am concerned about is that if you
17 don't have a structural solution to this, maybe it
18 will never come. Maybe it comes 50 years from now.

19 COMMISSIONER YAROWSKY: Here's what I may
20 want to direct to the other witnesses so they can
21 jump in. There are structural answers, and there are
22 also dynamic answers. I think we have heard some
23 suggestions in the dynamic area. How can we improve

1 both communication coordination between these two
2 agencies and drivers in antitrust enforcement?
3 That's what I'm kind of interested in.

4 I understand the structural. That may be
5 the simpler, less messy answer, but it also does, in
6 my view, great harm to certain federalism concerns
7 that I don't think we should just throw aside
8 lightly. And that's why I'm--you know, rather than
9 just jumping to that point, are there some middle-
10 ground answers?

11 Last Congress, for example, Congress passed
12 a little small package of antitrust provisions that
13 included an amnesty provision, which gave, as you
14 know, the DOJ the power to reach a settlement with
15 one conspirator in return for reduced damages.

16 At that time the state AGs were brought in,
17 General Rowe, because they were concerned that that
18 would preclude their ability or limit their freedom
19 of movement. There was some compromise worked out.

20 I'm not saying that's the model one way or
21 the other, but that's the kind of process that
22 happens sometimes on Capitol Hill. That's also a
23 process that, intellectually, I would be interested

1 to hear, are there suggestions short of structural
2 answers, which is a valid way to proceed, that could
3 preserve both authorities and yet improve
4 communication coordination?

5 PROFESSOR FIRST: Well, that's a very good
6 question. My reaction, in this sense, it goes--picks
7 up on what Deb Garza was asking about as well, is
8 that the methods of coordination that are being used
9 now are actually working pretty well.

10 The problems with legislation are that
11 writing these rules *ex ante* to allocate relationships
12 is, (A) very difficult and (B) creates costs of its
13 own, as then people start trying to figure out what
14 these rules are, how you impose them, and playing
15 with them.

16 I think this is going on in the European
17 Union right now. In fact, I clipped out of the *Wall*
18 *Street Journal* a story--this was in this morning's
19 paper, "Spanish Takeover May Face EU Antitrust
20 Review."

21 So the two parties are now having to jockey
22 and litigate over who gets this case.

23 Now, is this the way we really want to go

1 with hard and fast rules? You know, my feeling is
2 no, that there are tremendous forces for
3 coordination. It can be done better. Bill Kovacic
4 suggests the Domestic Competition Network. I think
5 we should start thinking of things like this. But
6 writing hard and fast rules is very difficult and
7 costly in itself.

8 I do want to respond to one thing that you
9 said about interstate commerce and this anachronism
10 notion that Professor DeBow mentioned.

11 One of the interesting things about the
12 early cases is that they weren't local cases. If you
13 look at the early cases, the states were taking on,
14 and had difficulty because they were taking on, the
15 national, major trusts of the day.

16 The states brought suit against
17 International Harvester for the combination that
18 monopolized the market before the Justice Department
19 did, and two state antitrust cases were before the
20 Supreme Court in 1914, when they passed the Federal
21 Trade Commission Act. It wasn't--this was not a
22 divvying up of responsibility; this was complementary
23 enforcement to get at the difficult issues of those

1 days, which were not confined to two gas station
2 owners fixing prices, you know, on opposite corners
3 of a highway.

4 So I am not sure that the interstate
5 commerce power explains a lot. I'm not sure whether
6 it's anachronistic or not. There are things with
7 local effects that obviously affect interstate
8 commerce.

9 So it becomes very difficult to divvy these
10 things up, because people work on it on a constant
11 basis together. I think that's what General Rowe
12 describes.

13 COMMISSIONER YAROWSKY: Can Phil just
14 respond if it's quick?

15 MR. PROGER: Well, I think federalism in
16 2005 is not federalism as it was in 1890 or 1900. I
17 think we have moved way past that.

18 I think that I do share the point that the
19 rules may be very difficult to work out, but I think
20 there is some benefit in thinking about this.

21 I would note in the example mentioned in the
22 *Wall Street Journal*, because I have some familiarity
23 with it, that it isn't clear, though, that both

1 parties won't be able to investigate. It's either
2 the Commission or it's the Spanish authority. And so
3 it's a different debate.

4 CHAIRPERSON GARZA: Commissioner Shenefield.

5 COMMISSIONER SHENEFIELD: Thank you, Madam
6 Chairman.

7 Thanks very much for your written
8 submissions, and for your testimony here this
9 afternoon. It's been very helpful.

10 I have to confess--and this is not meant
11 with any disrespect to the attorneys general of the
12 states--I come to this debate having had a terribly
13 unfortunate experience in the offices of one of our
14 state attorneys general. As I sat down to talk to
15 him about a case, he told me almost immediately,
16 before I could get a word out, where his next
17 fundraiser was, and in the Antitrust Division, at
18 least, the tradition was that there could not be any
19 communication between the White House and the
20 Antitrust Division or Capitol Hill and the Antitrust
21 Division. You simply weren't allowed to take those
22 calls.

23 So I guess my question of all of you is

1 this: Isn't it perfectly obvious--whether it's
2 dispositive or not is another question--but isn't it
3 perfectly obvious that state enforcement is more
4 susceptible to political influence, to local
5 geographic powers such as leading companies in a
6 state, or special interests in a state? Isn't that a
7 perfectly obvious point? And then don't we have to
8 deal with it?

9 Let me start with you.

10 PROFESSOR DeBOW: Yeah. I mean I think any
11 practical theory of politics would answer your
12 question in the affirmative. And maybe if I could
13 suggest a non-antitrust example, and not one
14 involving any kind of the sort of questionable
15 fundraising or other ethical or even more serious
16 legal questions. Recall that the states rushed to
17 defend companies that were targets of hostile
18 takeovers by passing statutes that made the hostile
19 takeovers much more difficult to bring about. Almost
20 everyone in the field admits that all those statutes
21 are driven by the state legislature's interest in not
22 experiencing job losses as a result of plant closures
23 and the rest of it that often follows hostile

1 takeovers. That's maybe a less dramatic and less
2 arresting example of states' protecting what they see
3 as their own local economic and other interests,
4 perhaps at the interest of a national market for
5 takeovers and the market for hostile takeovers.

6 COMMISSIONER SHENEFIELD: So you would say
7 yes?

8 PROFESSOR DeBOW: Yes.

9 COMMISSIONER SHENEFIELD: Okay. Harry?

10 PROFESSOR FIRST: More susceptible--I have
11 no way of assessing that.

12 COMMISSIONER SHENEFIELD: What would your
13 intuition be?

14 PROFESSOR FIRST: My intuition is that
15 federal enforcement is susceptible to political
16 influences, both--on occasion, put badly, as you put
17 the fundraiser, and more generally --

18 COMMISSIONER SHENEFIELD: You said federal
19 enforcement?

20 PROFESSOR FIRST: federal enforcement, yeah.

21 COMMISSIONER SHENEFIELD: Is susceptible.

22 PROFESSOR FIRST: Is susceptible. I mean we
23 do remember the *ITT* case.

1 COMMISSIONER SHENEFIELD: Which is more?

2 PROFESSOR FIRST: Which is more? Today

3 I--I'm really hesitant to say this, because I
4 honestly don't know the extent to which, in
5 particularly important cases, there may be some
6 political--at least there is influence in two ways.
7 Either it's directly because of money, which is a bad
8 influence, and I don't think that goes on today. I
9 have no way of knowing on the federal level; I assume
10 it doesn't. And it may go on in the states, but
11 again, I have no way of knowing.

12 You had that bad experience and, you know,
13 your guess is that there may be some of that in the
14 states. But in a broader sense, I think one of the
15 concerns is that the state attorneys general are sort
16 of politically more out there than the assistant
17 attorney general in charge of --

18 COMMISSIONER SHENEFIELD: They are elected,
19 after all.

20 PROFESSOR FIRST: They are elected.

21 COMMISSIONER SHENEFIELD: Many of them; not
22 all of them.

23 PROFESSOR FIRST: And part of that can be

1 bad if it's--you know, I'm going to enforce it this
2 way because I raised money from certain constituents.

3 On the other hand, there is something about
4 democratic theory that might make one say, well, part
5 of it might actually be good. Maybe it aligns
6 antitrust enforcement with the interest of voters. I
7 mean, we are not quite, I hope, completely cynical,
8 the notion that that's possible.

9 Now whether--how much of any of this goes on
10 goes back to I think General Rowe's question. Is
11 there a problem here? What --

12 COMMISSIONER SHENEFIELD: Well, I thought
13 there was a problem --

14 PROFESSOR FIRST: There was a problem in
15 that case. I agree with you. And there was a
16 problem when Dita Beard, you know, got in touch with
17 John Ehrlichmann and killed the *ITT* appeal. That was
18 a problem, too. So it can go on. And maybe--what do
19 I know? Maybe there is still some of it today. You
20 know, some people look at some settlements and say,
21 "Gee, I wonder if there's"--I just don't have the
22 data.

23 COMMISSIONER SHENEFIELD: All right, sir.

1 Thank you.

2 MR. PROGER: Well, you know, Professor
3 First, I don't want antitrust to be a popularity
4 contest, so I don't agree with the voters point.

5 Let me be clear. Since you asked it in a
6 comparative way, the answer is yes.

7 COMMISSIONER SHENEFIELD: Attorney General?

8 ATTORNEY GENERAL ROWE: Not in Maine, and I
9 would hope not in any other state. I can assure you
10 not in Maine. I am elected by the legislature. I
11 serve the Speaker of the House. I'm as political as
12 anyone. It never happens on my watch. Never has,
13 never will. In fact, I turn away
14 people--they--I talk to people on occasion,
15 but--who are upset with what we are doing. Our
16 investigations start with the staff, they come up, we
17 continue them, and we treat everyone the same. I
18 know that for a fact.

19 I know I agree with Professor First. I
20 mean, I'm not going to get into some things at the
21 federal level, but I know that sometimes when we
22 change administrations, we see a change in how the
23 Department of Justice, Antitrust Division, is

1 carrying on in a case.

2 So, does politics play at the federal level?

3 Yes, it does. Does it play a role at the state
4 level? Apparently it did in the state you were in.

5 I feel badly about that. But I hope you can't say
6 that somehow state attorneys general are more
7 susceptible to political--I don't know, concerns, and
8 they are going to be more likely to change the way
9 they enforce a case because of that than anyone else.
10 That's a problem.

11 COMMISSIONER SHENEFIELD: Let me pose a
12 hypothetical to you. Suppose there were a
13 monopolization case against a large out-of-state
14 company, and one of the in-state companies for this
15 hypothetical attorney general was a failing
16 competitor. Don't you think there is some greater
17 tendency for that state attorney general to embrace
18 the position of that failing in-state company than
19 there would be for a federal official who had to look
20 at it across the board?

21 ATTORNEY GENERAL ROWE: Perhaps in terms of
22 human nature, in terms of living in the state, in
23 terms of maybe knowing people who work at that

1 company. But I don't think that's going to change at
2 the end of the day what you do based on whether there
3 is a violation of a law or not in terms of the
4 enforcement action you take. Is it going to make it
5 more difficult for me to make--you know, to file an
6 action? Perhaps. But I'll still do it.

7 I mean that's why I said at the beginning of
8 my testimony, we treat everyone the same, globally or
9 locally. If we don't, that's the problem. And I
10 think that's why a lot of you are here today. You
11 are concerned about states.

12 You know, the states are sovereigns. You've
13 got 50 sovereign governments. We don't always agree
14 with one another. It's not the government versus the
15 feds versus the states.
16 You've got 52 folks out there, right?

17 And, listen, I went to the U.S. Military
18 Academy. I served in the Army. I believe in the
19 federal government. I'm so happy we have a federal
20 government. But I just believe in federalism, too.

21 [Laughter.]

22 ATTORNEY GENERAL ROWE: And I know that --

23 COMMISSIONER SHENEFIELD: This is coming out

1 of my time, now.

2 ATTORNEY GENERAL ROWE: Okay. I'm sorry.

3 COMMISSIONER SHENEFIELD: Let me ask a
4 different kind of a question.

5 Professor DeBow, if your only two choices
6 were the *status quo* and state enforcement confined
7 to--and we'll leave how we define it for some other
8 day--confined to hard-core Sherman Act violations,
9 you would be for the second and not for the *status*
10 *quo*?

11 PROFESSOR DeBOW: Right.

12 COMMISSIONER SHENEFIELD: And if that--if,
13 on the other hand, the provision was that the states
14 could do everything they now do except they couldn't
15 participate in merger investigations in cases and
16 structural section 2 cases--in other words, opening
17 up everything--keeping it as it is except walling
18 them off from section 7 and structural section 2
19 cases and the *status quo*, would you prefer that? Or
20 would you just as soon go with the *status quo*?

21 PROFESSOR DeBOW: Well, I would prefer that
22 to the *status quo*.

23 COMMISSIONER SHENEFIELD: So any diminution,

1 you would think, is an improvement over the --

2 PROFESSOR DeBOW: Well, I guess--and the
3 point being that it's not really so much the scope as
4 it is to try to tie what the states are doing more
5 completely to the federal standards, federal case
6 law, federal enforcement philosophy as reflected in
7 different administrations' take on that and so on,
8 yeah.

9 COMMISSIONER SHENEFIELD: Final question,
10 Attorney General Rowe. On page seven of your
11 testimony, you mention modest incremental initiatives
12 designed to rationalize the joint review process in
13 the merger area. What did you have in mind?

14 ATTORNEY GENERAL ROWE: Well, I mentioned
15 the--specifically the one thing I would offer up
16 today, and I would be amending the
17 Hart-Scott-Rodino statute, and I mentioned that.

18 COMMISSIONER SHENEFIELD: You did. Nothing
19 else?

20 ATTORNEY GENERAL ROWE: I don't have
21 anything specifically, no.

22 COMMISSIONER SHENEFIELD: Okay. That's
23 helpful. Thank you.

1 Madam Chairman.

2 CHAIRPERSON GARZA: Okay. Commissioner
3 Litvack.

4 COMMISSIONER LITVACK: Well, like Professor
5 DeBow, I may be the Lone Ranger on this group, and
6 I'm not sure I can even find a Tonto. At least you
7 had one. Because I'm sort of like General Rowe; I'm
8 not sure I understand the problem. And more
9 importantly, I fear that the solutions may be worse
10 than the problem.

11 Let me just ask a question--let me start
12 with you, Professor, if I may, which is, are you
13 suggesting--you were talking about the importance to
14 business of certainty and predictability. Do you
15 think they have it today from the federal government?

16 PROFESSOR DeBOW: I guess, as compared to
17 what, you know, would be the--

18 COMMISSIONER LITVACK: I don't know, but if
19 you have some standard in your mind that businesses--
20 and I advise them all the time--ought to be able to
21 predict and know and be comfortable and confident how
22 their government is going to react to a merger, a
23 course of conduct, a business plan, my question is,

1 do you think businesses have it today from the
2 federal government?

3 PROFESSOR DeBOW: They would have more
4 predictability if there was less state--less
5 possibility of state involvement. So whatever level
6 of unpredictability you may have--maybe it's not
7 optimal and maybe it's not what people would like--at
8 the federal level is only
9 compounded--the unpredictability is only compounded
10 by the presence of the states.

11 COMMISSIONER LITVACK: Well, what you have
12 when you have the states, obviously, if you do have a
13 divergency or potential for divergency, and I think
14 General Rowe said it, or at least I wrote it after he
15 said something, which is not surprisingly, there is
16 probably a price to be paid for divergency. And the
17 question is, how high is the price, and is the price
18 worth it? And so I want to just focus for a moment
19 on what the price is.

20 The only price I heard so far that at least
21 resonates with me is, it seems to be the burden, the
22 potential burden on businesses in complying with or
23 responding to or talking with different potential

1 enforcers.

2 Let me start with the General. Is that
3 right, or is there some other burden I'm missing
4 here?

5 ATTORNEY GENERAL ROWE: I think you're
6 right. That's what we hear. There's a great number
7 of states involved. They are issuing subpoenas, they
8 are doing depositions. We try to partner with the
9 federal government and streamline that and just do it
10 one time if we can, but certainly that's a complaint
11 that we hear.

12 COMMISSIONER LITVACK: Mr. Proger, you are a
13 practicing lawyer. Is that really the issue, and if
14 it is, can it be solved pretty easily?

15 MR. PROGER: I don't know--well, I think it
16 can be improved, and I tried to deal with that. But
17 I think that--I don't want to say it's the states or
18 it's the federal government. I think it's simply a
19 function of multiple enforcement. It means increased
20 costs and, less predictability, and those are two
21 significant burdens. And I'm not sure that I agree
22 with the basic nature that when you have a common set
23 of statutes being applied it's good to have multiple

1 interpretations of them.

2 I know Professor First and others have
3 suggested that there is some value to that. I told
4 him I thought his paper was outstanding. It raised a
5 lot of issues with me that I want to think about.
6 But intuitively I'm negative on that.

7 COMMISSIONER LITVACK: If you did away with
8 the ability of the states to enforce those statutes,
9 wouldn't you have multiple enforcement anyway, from
10 private parties?

11 MR. PROGER: Well, that's a different
12 subject, but the answer is yes, and I have other
13 views on that that are similar to my view here.

14 COMMISSIONER LITVACK: So, in other words,
15 you would strip it all away, put it all in the hands
16 of an assistant attorney general or three
17 commissioners at the Federal Trade Commission and
18 say, take my chances?

19 MR. PROGER: One of the things we haven't
20 talked about is that I would like to see more
21 judicial determination. And, by the way, that raises
22 another question. One of the reasons I do think the
23 states--I feel the states have done a really good job

1 in *parens patriae*. Mergers are a different
2 situation. But the one thing I wouldn't like to see
3 is more state actions under state statutes going to
4 state court judges.

5 COMMISSIONER LITVACK: You just touched on
6 something that was my last point, which is, to the
7 extent that you are talking about multiple
8 enforcement, or different, at the end of the day, in
9 our system, perhaps, unlike some others, is that it's
10 not about who brings the case; it's about who decides
11 the case.

12 In other words, fine, someone can bring
13 suit. If you have a time period where the federal
14 government was not enforcing the laws as vigorously
15 as some state attorneys general thought they ought
16 to, whether the state attorneys general are right or
17 wrong, not in bringing the suit, but ultimately, is a
18 function of the courts. Doesn't that deal with the
19 problem, Professor, if I may direct it to you?

20 PROFESSOR FIRST: Yes.

21 [Laughter.]

22 PROFESSOR FIRST: But it also
23 illustrates --

1 COMMISSIONER LITVACK: Don't elaborate. I
2 like the answer.

3 [Laughter.]

4 COMMISSIONER LITVACK: Please, feel free.

5 PROFESSOR FIRST: It also helps to highlight
6 how consistency is such a difficult goal in the end
7 because how many of you have sat around and said,
8 "Okay, where do I want to bring the suit, because the
9 laws are different in different circuits?"

10 So even with federal law, this notion of
11 consistency--and I guess I keep thinking of my
12 students saying, "Tell me, is there anything
13 consistent in antitrust? What are we learning here?"
14 That may be a comment on my teaching.

15 [Laughter.]

16 PROFESSOR FIRST: But consistency is good;
17 it's not the ultimate goal because you may pay for it
18 in terms of stifling the creativity and the evolution
19 of antitrust, which will have to go on.

20 COMMISSIONER LITVACK: So far more so than
21 if you had predictability. What about all we lawyers
22 who sit around advising people? They wouldn't need
23 us.

1 [Laughter.]

2 COMMISSIONER LITVACK: I yield. Thank you.

3 Thank you, Chair.

4 CHAIRPERSON GARZA: Okay. Commissioner

5 Jacobson.

6 COMMISSIONER JACOBSON: Commissioner

7 Litvack, you are not a Lone Ranger.

8 [Laughter.]

9 COMMISSIONER JACOBSON: On this subject.

10 And I'm usually pretty good about asking questions
11 rather than making statements, but this is an area
12 where I have a couple of things that I do want to put
13 on the record.

14 The first one, Sandy just completely stole
15 my thunder because I do think it's unassailably
16 correct that the only thing a state attorney general
17 can do is bring a lawsuit. And, ultimately, that is
18 going to be determined either by a state or a federal
19 judge, so it's not like the state attorney generals'
20 work is self-enforcing except in the context of
21 issuing a subpoena and conducting an investigation.

22 The state attorneys general have no
23 Hart-Scott hold, so mergers can get through unless

1 the federal judge in most cases, conceivably a state
2 judge, says no, you can't consummate the merger.

3 So the amount of harm is limited to
4 investigatory costs, and I think, in the context of
5 major deals that we are talking about as the source
6 of the problem, that those are a tiny fraction of the
7 overall transaction costs involved.

8 The second point I want to make is something
9 of an anecdote. I first met Sandy many years ago on
10 the *Ocean Shipping* case which was a grand jury
11 investigation conducted by Commissioner Shenefield at
12 the time, and we represented a couple of U.S.
13 companies, but most of the defendants were foreign
14 corporations, British, French, and German
15 corporations, who were infuriated that the United
16 States was conducting a criminal investigation into
17 activities being undertaken that were considered not
18 aberrational in those countries at that point in
19 time. Yet the United States took the view that you
20 want to do ocean shipping into the United States,
21 you're going to be subject to its laws. And the
22 result of that was an extensive investigation
23 resulting in guilty pleas and significant private

1 recoveries as well. And not only did no one bat an
2 eyelash at the assertion by the U.S. of its law into
3 the conduct of people outside the United States--by
4 the way, in the face of several blocking statutes
5 that were enacted in large part in response to that
6 investigation--but over the course of time, the other
7 countries involved ultimately adopted the U.S. view
8 of what was right and what was wrong in terms of
9 whether price fixing was a good thing or not.

10 And yet, here today, we are saying, you
11 know, some people are saying, "Oh, my goodness, why
12 should Maine be able to exert its authority over
13 people who have the temerity of actually doing
14 business in the state of Maine?" Candidly, I don't
15 see a major difference between the two, and it may be
16 that if Maine has a unique parochial view that
17 infuriates people like the clients that, you know,
18 many of us represent, that that may turn out in 25
19 years to be a good thing, just as I think history
20 says the *Ocean Shipping* investigation was a good
21 thing.

22 The third thing is a little more brief. I
23 would like the states to stop apologizing for

1 *Microsoft*. I think it was a fair thing to do. This
2 was a level of activity that was hotly debated on
3 both sides, but for law enforcers to take the
4 position that we view this conduct as in violation of
5 the law, we don't necessarily share the views of the
6 federal enforcers, particularly when the
7 administration changed hands, that that is something
8 to apologize for; I think is just wrong, and I
9 really--and I hear it so often from the state
10 enforcers--well, this is not *Microsoft*, we're not
11 doing that.

12 I would like to stop hearing that,
13 personally, and I'm sure there are others who feel
14 completely different from me on all these issues, but
15 I did want to state my piece.

16 Having said that, I do have a question. I
17 have very few. But, Mr. Proger, what are the
18 predictability costs that you see that are engendered
19 by state investigations, particularly in the merger
20 area, that are different in kind from the
21 predictability costs *vis-à-vis* an investigation by
22 the FTC or the DOJ?

23 MR. PROGER: Well, just measuring one

1 investigation versus another, I don't see a
2 difference. I think it's the multiple nature that
3 creates the unpredictability. Although, as I do
4 point out, I do think the states ought to address
5 their guidelines, particularly since they don't, as a
6 practical matter, follow them. And General Rowe
7 pointed out that the states generally follow the
8 federal merger guidelines, and I think it would be
9 helpful if the states would--and again, they are
10 separate sovereigns, so we say, "the states."

11 Apropos your point, I respect that dignity
12 that each state would have to make the decision, but
13 I do think that it would be good for them to announce
14 that--either let them update the NAAG guidelines or
15 announce that they are going to follow the federal
16 guidelines.

17 But in terms of predictability, I think it
18 is wrong to gang up on the states as being the
19 problem. The problem is multiple enforcement, in my
20 mind, and that's part of our system. And I don't
21 have a problem with what the states have been doing.
22 That's our system, and I do respect the fact that
23 General Rowe is responsible for the citizens of his

1 state, and if particular conduct is affecting them,
2 then he has a right to enforce his laws or the
3 federal laws under *parens patriae*.

4 But if all 56 jurisdictions, as there are
5 and as he points out in his paper, do that and they
6 don't do it in a consistent way, and the federal
7 government does it in yet another way, is that good
8 for the country, and is that good for--you know, how
9 do you explain--Commissioner Jacobson, I know you
10 represent clients. How do you explain to your client
11 that one enforcer believes that this law is not
12 violated by their conduct, but another enforcer
13 believes that this law is, and how does the client
14 then, in a responsible law-abiding way, conduct
15 itself? I think it makes it harder. And I think it
16 is inherent in our system, and I think that we ought
17 to think about some ways of rationalizing it.

18 COMMISSIONER JACOBSON: Well, if it's a
19 merger case, you close, and you tell the state, you
20 know, if you really believe that, sue me, and I think
21 history says that they don't in most cases. They do,
22 like the *Bon-Ton* case, you know, it's a very unique
23 and discrete set of circumstances.

1 But you raise a very good point about the
2 guidelines.

3 General Rowe, why are those guidelines still
4 out there? I mean aren't they an anachronism?

5 ATTORNEY GENERAL ROWE: Mr. Jacobson, I
6 really can't speak to that. The state of Maine uses
7 the federal merger guidelines. We don't use the NAAG
8 guidelines. I'll get back to you on that as to what
9 the status is, how many states are using them. I
10 don't want to comment, because I don't know the facts
11 on that.

12 But I do want to just quickly not take too
13 much of your time. I didn't mean to apologize if
14 that's what you thought I was doing for *Microsoft*. I
15 was just saying that seems to be what has caused all
16 this, and I would just ask you to look at the other
17 99 percent.

18 I think the states that continued were
19 within their rights. I believe that the end result,
20 the decision, did add to it to protect consumers.
21 But even if it didn't, they had every right to do
22 that. They are sovereign states. And so I'm not--I
23 just, for the record, I'm not apologizing. We didn't

1 participate. I came in after--it was too late for us
2 to participate when I took office. But we--I do want
3 to make sure that--I didn't want to leave you with
4 the impression that I'm somehow apologizing for the
5 states, because I'm not doing that at all; please
6 know that.

7 COMMISSIONER JACOBSON: That was really
8 directed at others. I didn't take it that you would
9 be apologizing. But others, including people in this
10 room, have.

11 One last question, and that's for Professor
12 First. Harry, what would you think of a proposal to
13 eliminate private indirect purchaser actions and cede
14 the entire authority for indirect purchaser
15 litigation to the state attorneys general?

16 PROFESSOR FIRST: This here clearly is me
17 speaking myself, not on behalf of the state attorneys
18 general. I wouldn't be in favor of that, actually.
19 I think that--there is a--in these cases there's more
20 of a problem between the private bar and the
21 attorneys general than between the attorneys general
22 and the federal enforcement agencies. And there is a
23 tension here.

1 The private bar brings its own level of
2 expertise. The private bar sometimes finds cases
3 that the states do not find. I think something that
4 eliminated private enforcement and those incentives
5 would, in the end, hurt antitrust enforcement,
6 because I think they do bring an important component.

7 Now that said, of course, the private bar
8 has its own set of incentives for what it does,
9 particularly in terms of fees, the ability of the
10 states to perhaps cut down the bill, the extent that
11 the privates may not represent everyone out there,
12 and the states may represent their consumers and
13 particular classes.

14 In the end, I think it's a net benefit. So
15 this is another difficult dance that goes on in
16 another set of relationships. But if it works well,
17 you preserve the incentives for private enforcement,
18 and maybe squeeze out some potential for abuse in
19 that, because the states, although they are not
20 perfectly immune to getting attorneys fees, the real
21 goal is to get recoveries to consumers.

22 COMMISSIONER JACOBSON: Thank you, Madam
23 Chair.

1 CHAIRPERSON GARZA: Commissioner Cannon.

2 COMMISSIONER CANNON: Thank you, Madam
3 Chairman.

4 Thank you, everybody, for coming. I
5 appreciate that. It's nice to see you after, 20
6 years is my guess, or something like that. You look
7 the same, and I don't--I can't --

8 [Laughter.]

9 COMMISSIONER CANNON: I wanted to follow up,
10 I think, kind of as a corollary to what Commissioner
11 Shenefield was talking about, but also something that
12 Phil said, which is, you know, he's just not in favor
13 of antitrust being a popularity contest.

14 I mean, it is. Unless and until the day
15 ever comes that the final decision to bring a case or
16 not bring a case, or to challenge a merger or not
17 challenge it, whether it's at the Justice Department
18 or the FTC or any state, for that matter, until
19 that's not an elected official or an official
20 appointed by an elected official, then it seems to me
21 that it is a popularity contest.

22 I mean, politics, all you have to do is look
23 at the history of enforcement over the last 20 or 30

1 or 50 years, and I think that's kind of amply
2 demonstrated. So I mean, God forbid, I can't
3 imagine--I mean, is it possible that politics played
4 any role in the selection of Commissioners on this
5 Commission? I mean, who knows, right?

6 [Laughter.]

7 COMMISSIONER CANNON: I mean I have no idea,
8 but perhaps it did.

9 [Laughter.]

10 COMMISSIONER CANNON: But I'm trying to make
11 a point, which is, pretty simply, it's not a bad
12 thing for this to be reflective of how the general
13 public feels about this stuff.

14 I guess, getting to that, the question I've
15 got really gets down to resources. When I read,
16 Phil, your comments about kind of the imbalance
17 between resources at the state and the federal level,
18 what I took away from that was, you were saying, when
19 there are limited state resources, that may
20 necessarily translate into bad enforcement or
21 inadequate enforcement or wrong decisions. Am I
22 taking too much from that?

23 MR. PROGER: No, although I would say that

1 again, I don't think you can be homogenetic about the
2 states. States like California and New York have
3 enormous capabilities and have large sections that
4 can differ from other states.

5 My point was more that what I was doing in
6 my paper was accepting federalism and accepting that
7 we are going to have it, so how do we make it better?
8 And I was wondering whether NAAG could be a vehicle
9 for permanent lawyers who are experts in this area,
10 like some of the sections of the federal government,
11 maybe economists, accountants, other people who could
12 be available to individual states like General Rowe's
13 state, where that expertise might be available, or
14 some working with the federal government, and I think
15 there is some of that.

16 But there is a difference in the resources
17 and the frequency with which each state sees the
18 matters, as compared to the federal agencies.

19 COMMISSIONER CANNON: But it wouldn't
20 necessarily translate that limited resources means
21 somebody has made a bad decision?

22 MR. PROGER: Correct.

23 COMMISSIONER CANNON: Okay. Great. Any

1 other comments about Phil's thought about the NAAG
2 having additional permanent staff on that? General
3 Rowe?

4 ATTORNEY GENERAL ROWE: Well, I saw that.
5 I'm not sure it would--maybe it would help to consult
6 with, but we are 50--again, we use the word
7 "sovereign" governments, but we are 50, and so NAAG
8 is an association of the states. We are members for
9 certain purposes. We don't all think alike or act
10 alike, as you well know, and so there could be some
11 benefit of having more resources. But I don't think
12 you should assume the states are all one government.
13 We are not, and so I guess I'm a little troubled by
14 that.

15 We don't have a lot of resources, which
16 makes us very frugal in the way we allocate our
17 resources, and we go after things that matter, and we
18 see health care in particular, market allocation,
19 price fixing, that stuff is important to us. The
20 FTC, it's way below their radar screen, most of the
21 stuff that happens. We spend a lot of our time.

22 Anyway, antitrust based on popularity, I
23 just want to go back to what Commissioner Jacobson

1 said. We can only investigate and we can put things
2 in front of judges. It's their call; you know what
3 I'm saying? And our judges are not elected. Our
4 judges are appointed and confirmed just like federal
5 judges.

6 COMMISSIONER CANNON: Oh, I think we agree
7 on that. The point I was trying to make was, in
8 terms of, everyone can make a decision to try to
9 prosecute or try to put somebody in jail or try to
10 stop a merger, but it eventually gets to the courts
11 one way or the other. So this Commission, you know,
12 we have the ability to suggest a million things, but
13 we certainly can't enact anything. You know, we are
14 an advisory commission, and that's it. So what we
15 say may be instructive or influential, but in terms
16 of it being dispositive, not in a million years.

17 Mike, what do you think about Phil's
18 suggestion on that, and Professor First, about the
19 NAAG staffer?

20 PROFESSOR DeBOW: Couldn't hurt, I guess. I
21 mean, if the states stay in this, I assume over time,
22 their role would grow. I mean, it's just sort of in
23 the nature of government to grow like that, right?

1 And so if you could have a staff back-up for the
2 smaller states and sort of a coordinating body,
3 perhaps, at a national but sub-national level, that
4 might facilitate conversations with the federal
5 authorities as well.

6 COMMISSIONER CANNON: Professor?

7 PROFESSOR FIRST: In some ways, it's good,
8 but I think that--and this is just my own personal
9 reaction, that what the states really need is more
10 policy planning and evaluation and --

11 COMMISSIONER CANNON: Individually,
12 collectively, or --

13 PROFESSOR FIRST: I think collectively. I
14 wouldn't--my sense is, I wouldn't want to sort of
15 institutionalize a third coequal enforcement agency.
16 I think, as General Rowe says, the states are
17 different, they have different interests, and they
18 work on different things, and so forth.

19 What the states lack, and, frankly,
20 sometimes the federal agencies lack, is policy
21 planning and evaluation, and I think that that's a
22 role that NAAG really could take, which the states
23 don't have time to do because they're too busy having

1 to field the cases.

2 Now there is a problem with economist
3 support in the states. In New York we were fortunate
4 enough to hire an economist in our office, and he
5 made a tremendous difference in what we were doing.
6 And I think that can be handled individually or maybe
7 in some regional way by getting the states more money
8 themselves directly, and that was the reason, I
9 think, through the *parens patriae* vehicle, you might,
10 without taxes, support the state effort better in
11 sort of a directly related way to what they do.

12 So I like Phil's idea in a way, but I would
13 direct the emphasis to policy planning and
14 evaluation.

15 ATTORNEY GENERAL ROWE: Commissioner, I also
16 appreciate Mr. Proger's suggestion. I would like to
17 just be able to supplement my answer. I'm going to
18 think about that more, maybe, and talk to a few
19 people, if I can, and so I would just like to be able
20 to do that. Maybe I won't. I stand by what I said,
21 but I would like to be able to do that.

22 COMMISSIONER CANNON: Sure. Thank you.

23 One thing I was going to comment on, on one

1 of your earlier comments, General, is about this
2 question of cases in the states kind of bubbling up
3 from the staff. I mean, look, my personal opinion
4 is, if you go out and you see something that you
5 think is a problem, there's not a thing in the world
6 wrong with you telling your staff, "Gee, I just saw
7 that or this, are we looking at that?" I mean, do
8 you see that as a problem? I assume you have done
9 that on occasion.

10 ATTORNEY GENERAL ROWE: Not at all. It's
11 simply that a lot of times our antitrust folks are
12 the ones who get the calls, who are talking with the
13 federal counterparts. No, not at all. But I mean,
14 I'm going to do that if I see it, and if I think
15 something is wrong, I'm going to say, "Would you look
16 at this?" Yes.

17 COMMISSIONER CANNON: It's kind of
18 interesting. I thought about this when John was head
19 of the Antitrust Division, and I had just come in as
20 a staff lawyer. My first matter or case--and you
21 will remember this, John, was registered land
22 surveyors in a county in South Carolina. Do you
23 remember that?

1 COMMISSIONER SHENEFIELD: Oh, I remember it.
2 It was a brilliant investigation.

3 COMMISSIONER CANNON: Thanks.

4 [Laughter.]

5 COMMISSIONER CANNON: I'm from South
6 Carolina.

7 COMMISSIONER SHENEFIELD: Mention what
8 happened.

9 COMMISSIONER CANNON: We did okay, actually,
10 come to think of it.

11 [Laughter.]

12 COMMISSIONER CANNON: No, it's funny, I'm
13 from South Carolina, and I had been in the Division a
14 month, and all of a sudden this case lands on my
15 desk, in Columbia, South Carolina. My parents
16 thought I was making it up because I was homesick to
17 be able to come home.

18 But, you know, at that time I thought if
19 there is ever a case that would be a great case for a
20 state AG to investigate and prosecute, that was
21 probably it. And I'm sure there are a lot of the
22 cases that you do that are in that context that are
23 clearly state focused, unless I'm missing something,

1 my guess is on that.

2 ATTORNEY GENERAL ROWE: Yes, there are, a
3 lot of the cases we do are.

4 COMMISSIONER CANNON: I did have one other
5 question for the panel, and I'm sure a lot of folks
6 followed this. But in the *Federated-May* merger that
7 was just consummated--and I come from a retail
8 background. I was in Circuit City for about 10
9 years. I did kind of pause when I read the settlement
10 with the states because it was--it struck me as a
11 little unusual. It's not unusual at all for there to
12 be divestitures in a merger, obviously. But I don't
13 know--are you familiar with that settlement?

14 ATTORNEY GENERAL ROWE: Not as much as I
15 should be to answer your question.

16 COMMISSIONER CANNON: Okay. Well, I see
17 Phil nodding his head. So I've got a connection
18 right here. But the thing about the settlement was,
19 it said there was an order of divestiture of a
20 certain number of stores. But the states came up
21 with their preferred list of purchasers, and it was
22 clearly in the kind of regional category. There were
23 some national retailers on there, but not a lot. And

1 essentially, as I read the settlement, if there was a
2 bid from one of the folks on that list--and, in fact,
3 there was a bid from another retailer that was
4 higher, as long as that original bid was deemed to be
5 commercially reasonable, then you had to take it.

6 Now that struck me as a little unusual, and
7 it also struck me as a little parochial.

8 COMMISSIONER SHENEFIELD: I rest my case.

9 COMMISSIONER CANNON: Okay. Phil, do you
10 want to comment on that?

11 MR. PROGER: Do I want to comment?

12 COMMISSIONER CANNON: Do you represent
13 anybody on that?

14 MR. PROGER: I signed it.

15 COMMISSIONER CANNON: You signed it.

16 MR. PROGER: That's my case. I represented
17 Federated on that, and negotiated that settlement.

18 COMMISSIONER CANNON: Did I mischaracterize
19 that at all?

20 MR. PROGER: That was a long investigation,
21 undertaken by the Federal Trade Commission. Millions
22 of documents, millions of gigabytes of information
23 was produced. The states were involved from the

1 beginning. It was a broader group initially. We
2 entered into the compact of confidentiality, agreed
3 to provide them all information, including HSR, that
4 we agreed to provide the government, and in fact did
5 so on a time-same basis.

6 At the end, the states disagreed with the
7 conclusion of the government. I'm not going to get
8 into the assurance because I think it gets
9 complicated. I do point out that it illustrates why
10 the ability to go to court is not always the answer
11 as a practical alternative. And I think something
12 that is public, so I'm not giving anything away, is
13 that the stores that we agreed with the states to
14 divest were stores we had previously publicly
15 announced were not going to be kept for business
16 reasons.

17 So a resolution was entered into--and, by
18 the way, the resolution was actually signed after the
19 closing, but it permitted the transaction to move
20 forward in a way that the parties deemed appropriate,
21 but there obviously was a significant divergence of
22 views as to how to enforce the same statute. And
23 that, as I have said today, is, as you all might

1 guess, is something hard to explain to the people
2 making the business decision.

3 The provisions in there reflected the views
4 of the states, that there was a traditional
5 department store market--I think you can read the FTC
6 statement on that issue--and a desire to be able to
7 divest those traditional department stores. So there
8 is a mechanism that is ongoing at this time.

9 But that is an example where you had
10 multiple enforcement on the same statute diverging
11 greatly, and I think you are aware the FTC actually
12 issued a statement of why it didn't bring
13 enforcement.

14 COMMISSIONER CANNON: My time is up.

15 CHAIRPERSON GARZA: Commissioner Burchfield.

16 COMMISSIONER BURCHFIELD: Thank you. I, as
17 has been the case throughout these proceedings,
18 greatly appreciated the statements that you
19 submitted. I read them with tremendous interest and
20 thought they were very well prepared and quite
21 thoughtful.

22 I just have a few questions. I may not
23 consume even the time I've got, but General Rowe, I

1 wanted to start with you and just ask you, when the
2 state of Maine brings an antitrust action, does it
3 generally tend to bring federal actions or state
4 actions?

5 ATTORNEY GENERAL ROWE: State actions in
6 most cases. I did cite some figures in the merger
7 area. We have had, I mentioned, 50 cases that have
8 resulted in consent decrees or court decisions in the
9 last 19, 20 years. Five of those were multistate of
10 the mergers, and those were in the federal forum. So
11 that's 25 percent, five out of 20 in the merger
12 category.

13 COMMISSIONER BURCHFIELD: I assume,
14 Professor DeBow, that because those federal
15 antitrust--the federal antitrust claims, when the
16 state brings them, generally are in federal court,
17 that that helps promote doctrinal consistency,
18 doesn't it?

19 PROFESSOR DeBOW: I would hope so. I mean
20 it's kind of hard to say, you know, give you a
21 certain answer about that. But I think that that is
22 true, yeah. I mean, federal judges would--it's not
23 that every federal trial judge would have experience

1 in trying an antitrust case, but you're more likely
2 to run into that on the federal bench than on the
3 state bench.

4 COMMISSIONER BURCHFIELD: All right. I
5 think that's right, but ultimately, they are
6 answerable to the Supreme Court, and they are trying
7 to apply the same doctrines, presumably.

8 Attorney General Rowe, your office also, I
9 assume, has jurisdiction over state consumer
10 protection statutes?

11 ATTORNEY GENERAL ROWE: Yes, we do.

12 COMMISSIONER BURCHFIELD: Do you often
13 co-plead antitrust and consumer protection?

14 ATTORNEY GENERAL ROWE: Sometimes we do,
15 yes. I wouldn't say often, but sometimes, yes.
16 Sometimes.

17 COMMISSIONER BURCHFIELD: I have seen, in my
18 career, claims pleaded under federal antitrust law,
19 state antitrust law, state consumer protection
20 statutes, and some statutes that are difficult to
21 categorize even in any of those categories. To the
22 degree the states see concerns of activities of this
23 sort, the point is, I take it, that they have other

1 tools available to them to protect the citizens of
2 their states, correct?

3 ATTORNEY GENERAL ROWE: I didn't follow your
4 question. Could you repeat that, please?

5 COMMISSIONER BURCHFIELD: If the states see
6 concerns--if the states have concerns about
7 particular activities of businesses in their states,
8 they have a variety of mechanisms to address that,
9 don't they, outside of the antitrust laws?

10 ATTORNEY GENERAL ROWE: It may or may not be
11 the case, depending on the facts. I mean, it may be
12 that we could bring an unfair trade practice action
13 or not. In most cases I understand from our chief
14 antitrust lawyer that we don't. But in some cases we
15 do. So I wouldn't say. I mean, if the question is,
16 do you need state antitrust law because you have
17 unfair trade practices act, the answer is yes, we
18 need state antitrust laws.

19 COMMISSIONER BURCHFIELD: And I'm coming at
20 it from a somewhat different position, and I
21 apologize for being a little obscure.

22 ATTORNEY GENERAL ROWE: Well, I'm obscure,
23 too.

1 COMMISSIONER BURCHFIELD: My concern is to
2 the degree that this Commission were to recommend
3 that state antitrust enforcement be pared back in
4 some respect, I suspect the unintended consequence of
5 that would be that states would still pursue similar
6 actions under different state statutes or different
7 common law theories.

8 ATTORNEY GENERAL ROWE: The answer is yes,
9 we would certainly try. If that's all we had, we
10 would use it as much as we could. This AG would,
11 yes.

12 COMMISSIONER BURCHFIELD: And that, pursuing
13 the same claims under different theories presumably,
14 Professor DeBow, would not lead to doctrinal
15 consistency?

16 PROFESSOR DeBOW: No, that's in fact--in my
17 statement, I say you would need to address the
18 "little FTC" acts as well, for the very reason you
19 are asking me.

20 COMMISSIONER BURCHFIELD: And probably
21 numerous other types of state statutes. Even state
22 common law.

23 PROFESSOR DeBOW: I don't know how you would

1 draft the statute, the preemption statute. I don't
2 know if you would have to specify each kind of
3 statute, each state's statutes that you are
4 preempting. I don't know. Could Congress simply
5 say, we are preempting the states to the extent that
6 it's inconsistent with the Sherman and the Clayton
7 Acts and be done with it? I don't know the answer to
8 that.

9 But you would have to address that.

10 COMMISSIONER BURCHFIELD: I want to turn to
11 your respective views on what this Commission, with
12 its power solely to recommend, should be thinking
13 about in terms of recommending in this area.

14 Mr. Proger, you made some suggestions about
15 what the NAAG can do, what the states might do to
16 cooperate more fully. Is it your suggestion that the
17 Commission recommend that they cooperate more, that
18 the Commission recommend that Congress encourage them
19 to cooperate more? What would be the concrete
20 proposal you would have for this Commission to make
21 the situation that you see better?

22 MR. PROGER: Well, I do think that the
23 states could cooperate more. Not all of the states

1 are even signatories to the compact. And I tried to
2 make some specific suggestions.

3 I approached this in this way, I'm not
4 looking for villains or bad conduct here. I think,
5 by and large, all antitrust enforcers, including the
6 states, try to do the right thing. But it doesn't
7 have to be broken to try to improve it. I believe
8 that we always should try to improve the process.
9 And I do think the multiple enforcement raises some
10 issues, and Chair Garza suggested what, to me,
11 sounded a little bit like the EU concept of community
12 dimensions or something across the board.

13 I think it is in a relatively small area
14 where you have something that is essentially
15 national, with the federal government investigating,
16 that we need to think about whether it's good to have
17 a proliferation of 56 other enforcers possibly also
18 investigating.

19 If the decision is that we should, then I
20 would hope that we could think of ways to do it in
21 the most efficient and consistent way possible so as
22 to minimize the burden of enforcement. Probably
23 something you're looking at in a different panel, but

1 the costs today of antitrust compliance in merger
2 investigations and other investigations today, as
3 someone who is old enough to have worked on reading
4 the original legislation for HSR for the antitrust
5 section and helping to draft some comments for
6 Eleanor Fox on that, no one contemplated that
7 companies would spend millions of dollars--I'm aware
8 personally of situations where translations cost
9 millions of dollars. And these are taxes that,
10 ultimately, consumers pay.

11 So I hope that you could recommend, and I'm
12 really grateful that you're here, some ways to make
13 the system better.

14 COMMISSIONER BURCHFIELD: Okay. General, do
15 you have any suggestions for what the Commission
16 could write in terms of affirmative recommendations
17 to make the system better? Either recommendations
18 that are legislative or are just merely precatory?

19 ATTORNEY GENERAL ROWE: Well, other than the
20 one thing I did mention today about authorizing the
21 federal agencies to share with the states the
22 premerger filings under HSR, I don't have any
23 specifics. There may be some. But I know a little

1 about your charge--I'll be real fast--and you are the
2 Antitrust Modernization Commission. That sort of
3 prejudices that it needs modernizing, and I guess I'm
4 asking you to step back and think about that. It's
5 working. It's working well, I believe.

6 I have offered one thing--I think would
7 allow the federal agencies to notify the states; the
8 states could get the information; we wouldn't be such
9 a burden to the merging parties.

10 Beyond that, I don't have any. What I'm
11 going to do again is supplement this real fast if I
12 can think of something as I leave today and get back
13 to you very, very quickly. But thank you for the
14 question.

15 COMMISSIONER BURCHFIELD: Please. And if
16 anyone else wants to supplement remarks today, we are
17 very open to receiving those.

18 COMMISSIONER YAROWSKY: Commissioner, would
19 you yield for a second?

20 COMMISSIONER BURCHFIELD: Yes, although I
21 don't have any seconds left. I want to get comments
22 from Professor First and Professor DeBow on that
23 point, but --

1 COMMISSIONER YAROWSKY: Would you comment,
2 though, at some point after answering Commissioner
3 Burchfield's question about model codes? It was
4 alluded to. It may not go for every subject matter
5 area, but is that something also that might have more
6 of a collective action that might be useful?

7 I'm sorry.

8 COMMISSIONER BURCHFIELD: Not a problem. My
9 pleasure.

10 Professor First, do you have any concrete
11 suggestions that this Commission might recommend?

12 PROFESSOR FIRST: Well, I did make that
13 suggestion for an amendment to 4(e) of the Clayton
14 Act, which would make clear that courts should--they
15 do sometimes now, but this is more discretionary--
16 allocate part of recoveries in federal *parens patriae*
17 cases to the states for state antitrust enforcement.

18 Now this does happen, but it's more *ad hoc*,
19 and I think this is an appropriate way to get capital
20 infusion into the states.

21 You know, it is certainly appropriate after
22 --you all are looking at a broad array of things, and
23 I think this is part of what I view as the antitrust

1 conversation that's going on. Policy competition,
2 shall I say, is an important part of what happens in
3 antitrust, and it's why, when we keep saying are
4 there problems, you don't see huge divergencies. You
5 may see some. You know, the states may still feel
6 that they define retail competition in a better way
7 than the federal government, even though others may
8 disagree, like the defendants. This has happened a
9 lot. It happened in mergers in California with food
10 stores. It's happened in supermarkets. It happens.

11 I don't think we should assume that because
12 the federal government has decided it and the states
13 differ, that, therefore, the states are wrong. It
14 may be, on occasion, that the federal government has
15 it wrong. This is how we develop things.

16 Now when we look at this assurance, we're
17 really talking on the margins, if these were stores
18 that were going to be divested anyway, then maybe my
19 complaint should be that the states are too weak, but
20 that doesn't seem to be the view around the table.

21 [Laughter.]

22 COMMISSIONER BURCHFIELD: Madam Chairman,
23 may Professor DeBow answer the question, which is,

1 I'm looking for any concrete suggestions you have.

2 PROFESSOR DeBOW: Beyond what I have
3 written, I don't have anything further. I haven't
4 been coy about my preference about this.

5 COMMISSIONER BURCHFIELD: That is definitely
6 concrete, I would say.

7 Thank you. Thank you all.

8 CHAIRPERSON GARZA: Thank you. Commissioner
9 Kempf?

10 COMMISSIONER KEMPF: Thank you.

11 Let me pick up on something that, Professor
12 First, you talked about in your written submission.
13 It says calls to decrease antitrust enforcement by
14 cutting down the role of states would seem to me
15 particularly ill advised.

16 That echoed something that, in his oral
17 remarks General Rowe said, "Gee, we surely don't want
18 to do anything that would lead to less antitrust
19 enforcement."

20 Maybe this is the question that everybody is
21 talking about. I don't think of more antitrust
22 enforcement being a good thing or a bad thing. I
23 think of it as a neutral thing.

1 First of all, I start off with antitrust as
2 being a hodge-podge of some very different statutes
3 that are, at times, inconsistent with each other.
4 And I view more antitrust enforcement that is sound
5 as good; I view more antitrust enforcement that is
6 ill conceived as bad.

7 I think of more antitrust enforcement of bad
8 laws as ill-advised and less antitrust enforcement as
9 good. So I don't think that I can subscribe to the
10 notion that says, gee, we don't want to have less
11 antitrust enforcement. I do want to have less
12 antitrust enforcement that is wacko, and I want to
13 have more antitrust enforcement of sound statutes.

14 To put it differently, when Attorney General
15 Rowe says, "Gee, when consumers are being ripped off
16 in my state, I think it's a good thing to go after
17 them." I am a strong believer that we should have
18 more enforcement of section 1, price fixing, and
19 things like price fixing, but I also have concerns
20 that perhaps we have too much enforcement of other
21 kinds of antitrust laws. Shared monopoly attacks,
22 merger attacks, monopoly cases--I think you said that
23 we haven't had one in several years now. I view that

1 as, perhaps, a good thing.

2 Robinson-Patman cases that are designed to
3 raise the cost of what everybody pays in America for
4 things they buy. I think more enforcement of that
5 kind is a bad thing.

6 So I don't view it as a more or less thing;
7 I view it as a sound versus unsound thing.

8 At one point, Professor First, you said,
9 "Gee, we don't want to stifle creativity in evolution
10 of the antitrust laws." I'm not sure I would sign
11 onto that. The creativity and searches for
12 creativity have gotten us into some pretty time-
13 consuming and wrong-headed types of things.

14 But when I go back to your question, I say,
15 "Does it cut too much?" Attorney General Rowe, for
16 example, does that mean that if we don't want to have
17 less, should we not only not cut back state
18 enforcement, but should you also authorize
19 municipalities to go after things that are in their
20 neighborhood? Or should we have not only the--
21 already we have two at the federal level. Should we
22 authorize the Bureau of Mines to bring antitrust
23 cases?

1 I mean the fact of more or less, you can
2 carry that on, and I really haven't seen a shortage,
3 because on top of all of that, we have private
4 actions.

5 So I suppose my first question would be to
6 Professor First and to Attorney General Rowe, and
7 that is, address, if you would, this concern that I
8 have that--let me pick up just to add a footnote on
9 Commissioner Jacobson saying, you don't need to
10 apologize. The states don't need to apologize for
11 the *Microsoft* case.

12 I don't think the states need to apologize
13 any more than the federal government does would be
14 the way I would look at that.

15 [Laughter.]

16 COMMISSIONER KEMPF: Or the private
17 competitors. And I have a large concern at the state
18 level, as I did at the federal level, of more
19 antitrust enforcement being translated into the state
20 government acting as a stalking horse for adverse
21 interests of consumers by protecting competitors who
22 don't sell products either as cheaply or make them as
23 well as other people, and they are suffering in the

1 marketplace because of that, and they turn to
2 antitrust enforcement at both levels, and especially
3 at the state level, as a way to protect themselves
4 from the public-serving rigors of competition. It's
5 antitrust upside down in one sense.

6 So my question is --

7 [Laughter.]

8 COMMISSIONER KEMPF: I sound like
9 Commissioner Jacobson. My question is: Therefore,
10 what? Please comment.

11 [Laughter.]

12 PROFESSOR FIRST: Well, if the seven judges
13 in the D.C. Circuit were here, who affirmed, in
14 essence, the core of the government's suit in
15 *Microsoft*, I'm sure they would not apologize, either,
16 for their decision. So I'm on the non-apologetic
17 tack.

18 I think that your concern about
19 protectionism and protecting competitors is of course
20 always something that antitrust enforcers are
21 concerned about because competitors do complain; it's
22 how you learn about things.

23 But there I'm skeptical. I think this is

1 the reason that, if you want competition, you want
2 this enforcement to be done by people who have an
3 interest in and a professional connection to
4 antitrust enforcement as it has evolved.

5 We didn't get to the point that we are at
6 today by chance. You know, if certain ideas about
7 antitrust are felt to be discredited, they got there
8 through a complex evolution that included bringing
9 particular kinds of cases or not. It included
10 guidelines; it included a whole host of things. And
11 I don't think we are at the end of days yet, either.
12 I think that we will continue to evolve.

13 Now should we bring bad cases? Well, okay,
14 that's--no, I don't think we should.

15 [Laughter.]

16 PROFESSOR FIRST: Should we bring good
17 cases, and are there likely more of them out there
18 than are currently being brought?

19 My quick sort of suggestive charting of
20 antitrust against the growth in the economy is a
21 suggestion that, as economic activity increases,
22 antitrust people can bet that there is more
23 collusion. You know this happens, and there are more

1 things to be worried about in that sort of economy,
2 whether it's bidding to state agencies that states
3 don't have time to go after, whether it's
4 anticompetitive decisions by state agencies that
5 state antitrust enforcement should pay more attention
6 to. There's more to be done, and that's why I said
7 I'd be more concerned about cutting back on this.

8 At some point I just don't understand why,
9 if we like competition, we would want less of that
10 sort of enforcement. Unless you can say you've got a
11 laundry list of horrors that the states have done, or
12 if the states weren't there, that the FTC did, or if
13 the FTC wasn't there, the Justice Department did.

14 So I don't see the list of horrors, and if
15 it's the Robinson-Patman Act, nobody enforces that,
16 of course, except the private bar. So you might want
17 to think about dealing with that statute, which I
18 assume you are, by--obviously you don't deal with it
19 by --

20 COMMISSIONER KEMPF: Let me narrow my
21 question, and I'll ask the other professor and the
22 Attorney General. And that is, since I think that I
23 would like to see more enforcement at the local

1 level, where dairies, road builders, home builders,
2 hospitals, you mentioned, and in my judgment, can be
3 a problem.

4 So, what about a compromise with the total
5 abolition that Professor DeBow advocates that says,
6 "Okay, here's what we're going to do?" States
7 can--we're going to limit their jurisdiction to
8 section 1 claims. What that would do would be
9 certainly a lot more section 1 claims and a lot less
10 other claims.

11 ATTORNEY GENERAL ROWE: Well, if you're
12 asking me, I think that would be wrong. My comment
13 earlier was that I hope we can agree that any reform
14 proposal that would appreciably diminish enforcement
15 coverage at any level should be rejected. I'm not
16 advocating that municipalities or counties have
17 antitrust enforcement tools. I think what we have is
18 working.

19 We are involved--the cases we are involved
20 with are more the cases that you're talking about,
21 "we" being my lawyers and my department. They are
22 the price fixing, the market allocation, the bid
23 rigging, those types of things.

1 We do get involved in mergers from time to
2 time. But a lot of the stuff intrastate doesn't
3 involve mergers. Sometimes it does.

4 But I don't know you have to--I mean your
5 idea is, well, we'll take this away from you, and
6 that way, you can dedicate your precious resources,
7 you know, target them more carefully. It doesn't
8 work like that, in my opinion. I think we do quite
9 well with the resources we have because I know what's
10 important--I think I do. We live in our state; we
11 know the markets; we know the players; we know what
12 we hear from consumers; and we alert the FTC on a
13 regular basis that we were looking at something, and
14 we ask "Would you like to look at it with us?"

15 So, again, I just don't think it's broken.
16 I'll stop there.

17 COMMISSIONER KEMPF: Professor DeBow.

18 PROFESSOR DeBOW: Commissioner Kempf, your
19 proposal is very similar to the one that I mentioned
20 in my earlier article, and I helped draft the
21 legislation that unfortunately died in committee in
22 Alabama, so I could send you a copy of that, if you
23 would like. I think that's a good idea, myself.

1 COMMISSIONER KEMPF: I would. I would
2 appreciate it.

3 In that same vein, I have just two quick
4 things for Mr. Proger. One, you are not a panelist
5 on the M&A section we're doing, but I would encourage
6 you to submit something on this issue that you raised
7 about M&A costs and how that has gone so far afield
8 from what was originally contemplated, and, at the
9 end of the day, that's a tax on consumers.

10 You also made an allusion, if I could
11 comment, where you said something like, perhaps there
12 should be more--there aren't any cases anymore, or
13 maybe the way you phrased it is that perhaps there
14 should be more cases. Can you expand on what you
15 meant when you said that?

16 MR. PROGER: Yeah. I was referring to the
17 fact--and I think it's pretty well known within the
18 antitrust bar. Some of us are old enough to remember
19 the Expediting Act that a lot less cases are getting
20 judicially decided. I can remember when I first
21 started that it was really important to hear each
22 year and each term what the Supreme Court was going
23 to say about certain things, and cases were coming

1 out of the Supreme Court. Now there are years when--
2 this year is a little different, but there are years
3 when we have no cases, and I think antitrust has
4 benefitted by a judicially determined body of law,
5 and we seem to have lost a little of that.

6 COMMISSIONER KEMPF: That's all.

7 CHAIRPERSON GARZA: Commissioner Carlton.

8 COMMISSIONER CARLTON: Thank you.

9 I, too, appreciated all your statements,
10 and, for me, it's especially helpful since I'm not
11 trained as a lawyer, as I'm trying to learn to
12 appreciate the costs and benefits of federalism.

13 I wanted to start off with that. I wanted
14 to distinguish--and I think everyone would agree with
15 this distinction--the difference between having state
16 law and federal law versus the difference between
17 having multiple enforcement agencies for the same
18 law.

19 Let me start with the first issue. I am
20 really trying to understand it in the context of a
21 statement that I think both Professor First and
22 Attorney General Rowe either have in their statements
23 or made in their testimony, in which you talk about

1 the benefits of competition in antitrust and make
2 reference to 50 separate laboratories.

3 I understand that entirely when matters are
4 local. What I cannot understand at all is how
5 competition is desirable when the effect of what you
6 do in one state has effects in other states. Because
7 we know that competition is desirable only when the
8 people who are doing the competing reap the full
9 benefits and costs of their actions.

10 To give you a concrete example, let's
11 suppose a state law says that you have to take into
12 account the adverse effects on the citizens, and that
13 is interpreted to mean job losses. If it's a
14 national merger, isn't it the case that competition
15 among state agencies in that case, individual states,
16 could be harmful? And we know competition doesn't
17 work properly in instances when you have these
18 multistate externalities.

19 So I just wanted to explore--I understand
20 the local matters, and that I am convinced of, from
21 your statements. But I don't understand the
22 statement as it applies to, say, a merger case or any
23 other case with national implications.

1 So could I start with Professor First and
2 then Attorney General Rowe?

3 PROFESSOR FIRST: You did start off by
4 making a distinction between state law and different
5 enforcement of the same law. So I just wasn't
6 certain which one now --

7 COMMISSIONER CARLTON: Different state laws.
8 Suppose there's a state that has a different law than
9 everybody else, and it gives a value to something
10 that the rest of the states don't care about, but
11 they will be adversely affected.

12 PROFESSOR FIRST: Okay. So my first
13 reaction is, we don't, because state antitrust law--
14 all the ones that I'm familiar with--basically--
15 unless there's something really clear--take the same
16 view of antitrust as the federal law.

17 So, you know, as a hypothetical, it seems to
18 me the way we have dealt with that would be through
19 the Commerce Clause, and whether there is some burden
20 on interstate commerce.

21 So I can answer that sort of hypothetically,
22 because I don't think that state antitrust laws
23 actually have those biases in it.

1 I think one of the concerns is that state
2 enforcement may be done in a way that would have
3 those biases, and I guess there is a potential for
4 that, although I would like to see actual examples.

5 One of the things that actually moderates
6 the concern for spillovers is multistate enforcement.
7 Because large cases generally require multistate
8 efforts. Single states don't have the resources.
9 And so it becomes very hard to see which state--if
10 there are spillovers, they would cancel, it won't get
11 into the mix quite so well as if it's one state
12 saying, "Ah ha, we are going to enforce it in a way
13 that imposes costs on another."

14 COMMISSIONER CARLTON: Unless it's the state
15 that benefits from the merger; that state wouldn't be
16 trying to stop it.

17 PROFESSOR FIRST: Well, if it is a
18 multistate enforcement action, it's going to be hard
19 to know, or, the more states you have in there--and
20 generally in large mergers you're going to have a
21 multistate and you will have the federal government
22 in it as well. It's sort of hard to figure out where
23 those spillovers are.

1 So I think it's a--you know, this is, to me,
2 more of a theoretical concern, both in terms of the
3 actual statute and in terms of the way enforcement
4 has been done.

5 COMMISSIONER CARLTON: Yes, but I thought
6 the notion that competition in antitrust is good was
7 precisely a theoretical concern. It's a theoretical
8 statement. And what I'm saying is it doesn't seem to
9 be correct when there are externalities that, you
10 know, maybe practically we can look at whether it has
11 had that effect in light of the state laws. But in
12 light of the fact, as I think was mentioned, that the
13 merger standards, for example, are different than the
14 federal, at least it could. So that as a theoretical
15 matter, the notion that competition among 50
16 laboratories supports federalism and antitrust just
17 doesn't seem right.

18 PROFESSOR FIRST: Well, to me, the way I
19 would think of it is that that competition has in
20 fact--I think in a way it's operated to take that out
21 of the calculus, frankly, without anyone saying,
22 "This is what each state law has to be." I think
23 that the different views have coalesced in a way that

1 there is agreement that that's not part of merger
2 analysis.

3 You're right that, as a theory, it's a
4 problem of federalism generally. You know, you could
5 have it in environment, you could have it in every
6 area we think about. So as I think about it, the
7 question is, how do you set up a structure that, on
8 an ongoing basis, will produce better results than
9 just simply saying, there is one way? And there is a
10 danger, and I think in some ways what we see is,
11 maybe there's a reason the danger hasn't come
12 through; because better policies have won.

13 COMMISSIONER CARLTON: Okay. Attorney
14 General Rowe.

15 ATTORNEY GENERAL ROWE: I would agree with
16 everything Professor First said. I would add that I
17 think the scenario you are pointing to, perhaps that
18 one state, it is about enforcement. It's whether
19 that particular state attorney general would get
20 involved or not. Maybe he or she wanted the merger
21 to happen and didn't care to investigate, because
22 they might find something. I don't know.

23 But all the folks on the same side of the

1 "v." in the action would be presumably in the
2 investigation, the federal agencies and the other
3 states. The competition is a healthy competition, I
4 think, Professor First is talking about. It's not
5 that you disagree fundamentally about whether the
6 merger should occur or not; it's more the nuances, I
7 think.

8 But I kind of misunderstood how you set that
9 up, but I thought I heard you say because of the
10 externalities, a particular state may not feel like
11 everybody else because their citizens were going to
12 benefit greatly by the merger, more employment, *et*
13 *cetera*.

14 COMMISSIONER CARLTON: Yes.

15 ATTORNEY GENERAL ROWE: I don't know what
16 would happen there. The question was put out
17 earlier, what would the attorney general of that
18 state do? How would he or she feel? Would they
19 neglect their duties to investigate what a violation
20 of state law and federal law was because of that?

21 COMMISSIONER CARLTON: Yes. That's
22 precisely my point.

23 ATTORNEY GENERAL ROWE: Yes. Well, I would

1 hope they would not. This one would not. I don't
2 know what other ones would do.

3 COMMISSIONER CARLTON: If they had different
4 objectives, which they are allowed to have, then it
5 seems to me that undercuts the basis for federalism.

6 Now maybe they can work it out and it hasn't
7 been a problem, but it strikes me as a theoretical
8 matter it's only eliminated if you confine the states
9 to local issues.

10 But let me go on, because I had an
11 enforcement question. Let's focus now on
12 enforcement, and let's suppose it's the same statute,
13 my assumption. Everybody agrees, and the state laws
14 are all identical, which, by the way, is not my
15 understanding. It's my understanding that state laws
16 do differ. But let's forget about that, suppose it's
17 a federal action, and I understand one of the
18 benefits that people have talked about is, at least
19 in the papers, if the government isn't living up to
20 its responsibility, for example, the states can step
21 in. So let's suppose the states don't think the
22 government is enforcing the antitrust laws, so the
23 states could step in.

1 Does that reasoning suggest that if the Feds
2 have stepped in, it's not necessary for the states to
3 step in? Maybe they want to cooperate, but we could
4 at least say we might want to give the federal
5 investigation the right to preempt state
6 interference. What would be the reaction of the same
7 two people to that proposition? If the Feds are
8 already investigating something or prosecuting
9 something, we let them settle the case or not, not
10 the states?

11 PROFESSOR FIRST: Well, I guess my reaction
12 is that, in many cases, it turns out that the federal
13 government actually likes to have the states
14 involved, and --

15 COMMISSIONER CARLTON: To have the option.

16 PROFESSOR FIRST: To have the option. I
17 mean, is the question then, should they be able to
18 say, "Go away and don't do anything?"

19 COMMISSIONER CARLTON: Yes.

20 PROFESSOR FIRST: I think from the--I'm not
21 sure of the need for that in this sense. I think if
22 in those cases it was up to the states then to say,
23 "Should we file a second suit, the same as the

1 first?" It would be maybe sort of an odd thing for
2 the states to do.

3 I think the role that has evolved--and
4 again, I think this is because there are some
5 efficiencies and some reasons for it, is some sort of
6 cooperative enforcement in those, and you see it a
7 lot in the merger cases, where the federal government
8 would like to have the support of the local attorney
9 general.

10 COMMISSIONER CARLTON: The question is
11 whether they have the right to tell them to go away.
12 But let me go on because I'm about out of time. I
13 wanted to ask both Mr. Proger and Professor DeBow
14 quick questions.

15 Phil, is it correct that--I just want to
16 make sure I understand your position. You would, in
17 the merger area, want the states to adopt the same
18 policy, say, as the federal merger guidelines?

19 MR. PROGER: I think my point reflects that
20 I think, as a practical matter, when you deal with
21 the states, they do follow the merger guidelines, and
22 if they do, then they ought to say so and follow
23 them, and they have outstanding NAAG guidelines, that

1 if they're not following that, then we ought to do
2 away with them because there is a certain cost of
3 having to review them and trying to deal with
4 something that's apparently on the books but not
5 being enforced.

6 COMMISSIONER CARLTON: And the last
7 question, a short one for Professor DeBow. Really,
8 Professor First touched on it. When you think about
9 competition among 50 independent laboratories with no
10 externalities across the states, you can think of how
11 a local economic matter might fit that. What is your
12 response, though, to environmental laws that may
13 differ across states or otherwise that may differ
14 across states for an industry that exports its
15 product to different states?

16 In other words, just like you can say, "I
17 only want to restrict states to passing laws that
18 affect their own citizens," would that mean in that
19 thinking, which I think is reflected in some of your
20 proposals, that you would also want to restrict the
21 states as to what other types of laws they would
22 enact if there were national corporations operating
23 on the borders of those states?

1 PROFESSOR DeBOW: I guess it's a matter of
2 degree, to a large extent. I mean, are there
3 significant effects outside the state's borders on
4 consumers? And if there are, I would try to be
5 consistent about my attitude about that.

6 If the out-of-state effects are minimal,
7 then I have no problem at all with Maine or Vermont
8 or Idaho or whichever wants to engage in a different
9 antitrust philosophy. That's fine. But in a merger
10 --

11 COMMISSIONER CARLTON: What about something
12 other than antitrust?

13 PROFESSOR DeBOW: Well, or anything else,
14 for that matter. I'm fairly strong on federalism as
15 a concept. I don't have an objection to that at all.
16 Could I just say a word about the question
17 about state and federal law? Your first question to
18 Professor First?

19 I would urge folks to--I think the federal
20 case law in many areas of antitrust is sort of
21 underdetermined. I mean you read the case law; it
22 goes to Commissioner Litvack's point earlier. There
23 is some uncertainty in the federal antitrust regime,

1 and to say, well, the states are going to try to
2 follow that federal law as closely as they can, I
3 think would be within the scope, arguably within the
4 scope of that commitment for a state court to revive
5 *Brown Shoe* in the merger area. It's still a
6 decision; it's not been overruled.

7 So I am not certain that you can just assume
8 that the state laws will either now or continue to be
9 linked as closely as perhaps would be optimal for
10 consumers to the federal substantive law.

11 CHAIRPERSON GARZA: Thank you very much to
12 all of the distinguished witnesses. I appreciate, we
13 all do appreciate, everyone on the Commission, the
14 time that you have taken, both to write your
15 submissions and to appear before us and to suffer our
16 questions.

17 I would like to say that this is definitely
18 the last you will hear from us, but I won't make that
19 commitment. Certainly, if there is anything that you
20 would like to submit to us to consider in light of
21 the questions to supplement your responses, please
22 feel free to do so. I will ask the staff to close
23 their ears. You know, we'll take anything that you

1 want to give us.

2 [Laughter.]

3 CHAIRPERSON GARZA: So we really are
4 receptive to anything that you have to say, so I
5 encourage you, if you want to, continue the dialogue
6 to feel free to do that.

7 General Rowe.

8 ATTORNEY GENERAL ROWE: I just want to
9 clarify one thing for the record. In response to
10 Commissioner Kempf, we talked about only having
11 Sherman 1 and maybe doing away--I said a lot of our
12 work, which is true, is price fixing and market
13 allocation, but it is about 40 percent, 20 of 50
14 cases involve mergers. So we are active as a state
15 in that area, too, both in multistate--mostly
16 intrastate but I wanted to clarify that because I may
17 have misled you, sir.

18 Thank you very much.

19 CHAIRPERSON GARZA: Thank you.

20 [Whereupon, at 4:08 p.m., the hearing
21 concluded.]
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